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No. 497

# In the Supreme Court of the United States

OCTOBER TERM, 1935

ST. JOSEPH STOCK YARDS COMPANY, APPELLANT

*v.*

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI*

## BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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## BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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### OPINION BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 910) is reported in 11 F. Supp. 322.

### JURISDICTION

The decree of the District Court was entered on May 1, 1935 (R. 141). Petition for appeal was filed May 24, 1935 (R. 147), and was allowed the same day (R. 163).

Jurisdiction of this Court rests upon Section 316 of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, 168 (U. S. C. Title 7, Sec. 217), making applicable to suits for injunction against orders of the Secretary of Agriculture the procedure provided in the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C. Title 28, Sec. 47), with respect to suits for injunction against orders of the Interstate Commerce Commission. The provisions setting forth this procedure are incorporated in Subsection 5, Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, Sec. 345).

## QUESTIONS PRESENTED

I. QUESTIONS GOING TO THE SECRETARY'S DETERMINATION OF THE CONSTITUTIONAL FAIR VALUE OF APPELLANT'S PROPERTY USED AND USEFUL IN THE RENDITION OF STOCKYARD SERVICES

A. Whether the commercial hotel known as the "Transit House", which is owned by appellant and operated by a lessee, and the land on which it is located, are used and useful in the rendition of stockyard services, and whether the action of the Secretary in excluding the value of such property from the rate base was lawful (Appellant's Brief, Point XI, p. 104).

B. Whether the Secretary's finding that the value of the land in Zone A is 16¢ per square foot should be sustained (Appellant's Brief, Point XV, p. 159).

C. Whether the Secretary's finding of the cost of reproduction new less depreciation of appellant's structural property should be sustained (Appellant's Brief, Point XIII, p. 130).

D. Whether a separate additional allowance for going concern value should have been made by the Secretary over and above the amount therefor which was included in the other items going to make up the rate base (Appellant's Brief, Point XII, p. 109).

II. Questions Going to Whether the Rates Fixed by the Secretary are Sufficient to Yield a Fair Return on the Fair Value of the Used and Useful Property

A. Depreciation reserve—whether in estimating the net return to the company from the rates prescribed, the Secretary has allowed a sufficient amount from gross revenues to cover repairs and a reserve for depreciation (Appellant's Brief, Point XIV, p. 134).

B. Rates and charges prescribed by the Secretary on livestock resold or reweighed for purpose of sale—whether the Secretary's estimates of the volume of livestock subject to such rates and charges and his resulting estimate of the yield from such rates and charges are excessive (Appellant's Brief, Point IX, p. 84).

C. Feedlot charges—whether the Secretary's estimate of the return which will be yielded by the maximum feedlot charges prescribed in his order

is excessive and whether the order prescribing such maximum charges is lawful (Appellant's Brief, Point X, p. 93).

D. Whether the various rates and charges prescribed in the Secretary's order are sufficient to produce a fair and non-confiscatory return on the constitutional fair value of appellant's property as found by the Secretary (Appellant's Brief, Points V, VII, and VIII, pp. 46, 69, and 74).

## III. Miscellaneous Questions

A. Whether the rates and charges prescribed by the Secretary are adequately supported by the findings, and whether appellant's existing rates and charges were unreasonable (Appellant's Brief, Points III and IV, pp. 29, 39).

B. Whether the various maximum rates and charges prescribed by the Secretary are fair and reasonable in their relation to each other, in the sense that the specific reductions prescribed by the Secretary in particular existing rates and charges are fair and reasonable (Appellant's Brief, Point VI, p. 60).

C. Whether the findings of the Secretary, which were the basis of his earlier order entered in 1931 prescribing maximum rates, were *res judicata* and binding upon the Secretary in prescribing maximum reasonable rates after the second hearing in 1933 (Presented in several of appellant's points, notably Point V, pp. 47–50; Point XI, pp. 104–106;

Point XII, pp. 112–113; and Point XV, pp. 171–172).

D. Whether the Secretary properly denied the petition for reopening and further hearing presented to him in February 1934 after the second hearing and prior to the making of the order herein complained of (Appellant's Brief, Point XVI, p. 176).

E. Whether the position taken by the District Court in its opinion with respect to the scope of judicial review constitutes reversible error (Appellant's Brief, Point I, p. 10).

## STATUTE INVOLVED

The relevant portions of the Packers and Stockyards Act (1921) are set forth in the Appendix (pp. 205–207, *infra*).

## STATEMENT

Appellant is a stockyard owner and is engaged in the operation of a stockyard which renders stockyard services as defined in the Packers and Stockyards Act, 1921. Its stockyard is located on the outskirts of St. Joseph, Missouri, in a section sometimes known as South St. Joseph (R. 24).

On October 9, 1929, the Secretary of Agriculture issued an order of inquiry and notice of hearing with respect to the reasonableness and lawfulness of the rates and charges at appellant's stockyards (R. 182–183). Pursuant to the notice, a hearing before an examiner was held at St. Joseph, Mis-

souri, beginning December 2, 1929 (R. 183). Voluminous testimony was taken with respect to all the questions pertinent to the determination of fair and reasonable rates. Numerous exhibits, including land appraisals, reports of engineers as to structural value, etc., audits of accountants, studies of depreciation of appellant's structures, and the like, were put in evidence by the Government and by appellant. This hearing was concluded December 17, 1929. Oral argument was subsequently heard by the Secretary and appellant submitted a brief (Appendix to appellant's brief, p. 11).

On February 11, 1931 (while the matter was still pending before the Secretary), appellant filed with the Secretary a "petition for reopening", alleging that due to certain changed economic conditions recited therein affecting appellant's operations, the proceeding should be reopened for the taking of further testimony (The allegations of this petition are fully recited in 58 F. (2d) 290, 291).

On July 20, 1931, the Secretary of Agriculture entered an order containing detailed findings of fact and prescribing a schedule of maximum reasonable rates and charges for observance by appellant (Appendix to appellant's brief, pp. 10–63). In the same order, without giving any reasons therefor, the Secretary denied the petition for reopening.

Appellant then instituted in the District Court for the Western District of Missouri a suit to enjoin the enforcement of the Secretary's order. In

that suit appellant challenged the power of the Secretary to value its used and useful property for rate-making purposes, contended that the prescribed rates were unreasonable and confiscatory, urged that the Secretary had erroneously denied the petition for reopening, and sought to introduce evidence before the court with respect to the matters contained in the petition for reopening. *St. Joseph Stock Yards Company* v. *United States,* 58 F. (2d) 290, 293. The court, in addition to receiving the record of the proceedings before the Secretary, heard additional evidence offered by appellant with respect to the alleged confiscatory effect of the order.

Subsequent to the hearing before the District Court but before its decision, this Court decided the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, in which it was held that the Interstate Commerce Commission had not been justified in denying petitions for rehearing alleging changed economic conditions in a proceeding in which the record had been closed in September 1928, and petitions for rehearing had been presented in September 1930, and February 1931. This Court held in that case that the enforcement of the order of the Interstate Commerce Commission should be enjoined on account of the denial by the Commission of the petitions for rehearing.

On April 16, 1932, the District Court, upon the authority of the *Santa Fe* case, granted a permanent injunction against the enforcement of the Sec-

retary's order. The court upheld the Secretary's power to value appellant's property for rate-making purposes, but expressly declined to pass upon the adequacy of the evidence taken before the Secretary to support the prescribed rates, or the question of whether upon the record made before the Secretary such rates would have been confiscatory. It is clear from the opinion of the court that the sole ground for granting the injunction was the refusal of the Secretary to grant the petition for reopening in the light of the changed conditions alleged in the petition and supported by the testimony taken at the hearing before the court.

On July 19, 1932, the Secretary entered an order reopening the proceeding and giving notice of further hearing (R. 394–397). The order reopening the proceeding, after summarizing the facts with respect to the previous hearing and the litigation, provided (R. 395–396):

> In view of the above mentioned decisions, the Secretary of Agriculture is of opinion that it is his duty, under the law, to reopen this docket and hold a rehearing to the end that all parties may be given opportunity to present such evidence of changes, both general and particular, which have occurred since the year 1929 as may be material to the issues raised by the order of inquiry herein; and also the end that all parties may have opportunity to present such other evidence as may be material to said issues; and further to the end that a general inquiry may be

had into the reasonableness and lawfulness of each and every rate and charge, and each and every rule and regulation affecting any rate or charge stated in any and all tariffs or schedules of rates and charges filed by respondent and now in effect for stockyard services rendered by it at the St. Joseph Stockyards, South St. Joseph, Missouri, wherefore.

It is ordered that the aforesaid order of the Acting Secretary of Agriculture entered in this docket on July 20, 1931, be and the same hereby is vacated and set aside; and that this docket be and the same hereby is reopened.

Pursuant to the above order and notice, a further hearing was held before an examiner at St. Joseph, Missouri, beginning January 10, 1933 (R. 397). This hearing was concluded February 16, 1933 (R. 26). A great deal of testimony was again taken with respect to matters pertinent to the determination of fair and reasonable rates, and many exhibits were again put in evidence by the Government and by appellant.

On February 2, 1934, while the matter was under consideration by the Secretary, appellant again filed a petition for reopening and further hearing, alleging certain facts (relating to changed economic conditions) which were submitted as grounds for reopening the case (R. 15–19). These allegations were that the Agricultural Adjustment Act would in the future cause reductions in the

amount of livestock received at appellant's stockyards (R. 16–17); that the enactment of the National Industrial Recovery Act increased appellant's costs (R. 17–18); that the action of the Federal Government in going off the gold standard and empowering the President to reduce the gold content of the dollar would necessarily increase commodity prices, wages, and property values, and that appellant's property had "already increased 25% since August 1, 1932, the date of the appraisals used in this proceeding, due to increase in material and labor prices and construction costs" (R. 18); and that since the close of the hearing there had been certain stated reductions in appellant's net operating income (R. 19).

On May 4, 1934, the Secretary of Agriculture entered his "Findings, Conclusion and Order" (R. 24–131) containing detailed findings with respect to pertinent rate-making factors, including a finding that the existing rates were unreasonable and unjustly discriminatory (R. 128), and prescribing a schedule of maximum reasonable rates and charges for the future (R. 128–130). The findings also included a detailed discussion and findings of fact with respect to the petition for reopening and further hearing (R. 26–29), and the order denied the petition (R. 131).

Subsequently, on May 15, 1934, appellant commenced this suit by the filing of a petition in the District Court to enjoin the enforcement of the order (R. 1–23). The petition contained the cus-

tomary prayer for convoking a three-judge court, and asked for a temporary injunction and a permanent injunction against the enforcement of the order (R. 23).

The Government did not oppose the granting of a temporary injunction and, at a hearing held June 9, 1934, a temporary injunction was granted upon condition that appellant furnish an adequate bond to assure refunds to the shippers of livestock if the order should finally be upheld.*

Although the petition filed in the District Court contained numerous allegations concerning the claim of confiscation, including allegations as to the net operating income for the year 1933, and other matters *de hors* the record before the Secretary (R. 20–22), no effort was made to introduce any additional evidence before the court, and the matter was submitted to the court at the final hearing solely upon the record made before the Secretary.

On May 1, 1935, the District Court rendered a memorandum opinion and findings of fact (R. 910–938) upholding the order of the Secretary and rejecting all of appellant's contentions (except those attacking the exclusion from the rate base of the value of several minor items of property found to be not used and useful, but the value of these items was so small that they were immaterial). The court made many specific find-

* The proceedings relating to the temporary injunction, and the order providing for it, were not included in the printed record on appeal.

ings of fact, and in addition adopted (with certain minor exceptions) the Secretary's findings of fact as its own (R. 938).

At the hearing before the District Court there was introduced in evidence an abstract of the record of the 1929 hearing before the Secretary, an abstract of the record of the 1933 hearing before the Secretary, and voluminous exhibits which had been introduced at the 1933 hearing (R. 169). After the present appeal had been allowed, both parties entered into a stipulation substituting a condensed narrative of the transcript of the evidence and proceedings in both hearings for the original transcript thereof, and further providing for the printing of only certain portions of the condensed narrative (R. 168–182). It was also provided in the stipulation that some of the exhibits introduced in the District Court should be transmitted to this Court as original exhibits and that they should not be printed. Those exhibits have been certified to this Court, pursuant to Rule 10, paragraph 4, and it has been stipulated that they may be referred to by both parties (R. 179–182).

The pertinent facts in this case are stated in the findings (R. 30–127, 910–938). Inasmuch as most of the issues on this appeal require discussion of the facts in connection with the argument, it seems that it would unnecessarily prolong this brief to undertake now to make a further separate factual statement. Accordingly, further recital of the facts will be left to the portions of the brief devoted to argument.

## SUMMARY OF ARGUMENT

This is the first case under the Packers and Stockyards Act, 1921, to present to this Court the ordinary issues of valuation and fair return in a stockyard rate controversy. Those issues are whether the valuation of appellant's property, upon which the Secretary of Agriculture has based the maximum rates prescribed in his order, is constitutionally sufficient; and whether those rates, in view of the volume of business to be anticipated and the deduction of proper charges from operating income will yield to appellant a constitutionally adequate return on the value of its property.

The Secretary found and employed as the basis of his order a value of $2,743,000 for appellant's property used and useful in the rendition of stockyard service. In arriving at this figure, he valued appellant's structural property at a reproduction cost new before depreciation of $2,637,186. In spite of the fact that many of these structures are more than thirty years old, the Secretary used reproduction cost, unmodified by any considerations of original or historical cost, as the basis of his valuation. Appellant apparently does not challenge the Secretary's finding of reproduction cost before depreciation but objects to the amount for accrued depreciation which the Secretary deducted, namely $597,570. Appellant contends that this deduction was excessive to the extent of $341,799. Appel-

lant's claim in this respect should be considered in the light of the fact that it carries on its books as accumulated depreciation reserve built up since 1915 a net amount of $1,771,063.64.

Appellant claims that the Secretary improperly excluded from the rate base as not used and useful a commercial hotel known as the "Transit House" and that the rate base should be increased by adding $120,143 as the value of this hotel. Appellant also claims that the value of that portion of its land known as "Zone A", found by the Secretary to be $480,635.68, or 16¢ a square foot, should be increased at least $275,164 on the basis of what amounts to testimony as to its special use value.

Appellant further claims that the rate base should be increased by a separate additional item for going concern value of approximately $273,300, or about 10% of the rate base, based upon testimony by one of appellant's engineers as to losses to be anticipated if the property were to start operation afresh until its present volume of business were reattached. The Secretary contends that full allowance for going concern value has been included in the valuation of the items going to make up the rate base and that therefore no separate additional allowance for going concern value is necessary.

Appellant thus claims that the rate base should be increased by $1,010,406 over and above the $2,743,000 found by the Secretary.

The Secretary estimates that under the new schedule of rates and charges prescribed in his

order, appellant's net income from operations available for a return upon its investment will be $195,564, or 7.13% on the valuation of appellant's property as found by him. This yield may be compared with appellant's actual net income of $276,651.95 in 1927; $339,267.11 in 1928; $314,127.39 in 1929; $279,029.72 in 1930; and $223,461.37 in 1931; $190,656.21 in 1932. These figures of appellant's actual net return constitute the following percentage return on the Secretary's valuation: 1927, 10.09%; 1928, 12.37%; 1929, 11.45%; 1930, 10.17%; 1931, 8.15%; 1932, 6.95%. It is significant to compare these percentages with the dividends actually paid by appellant during the years in question: 1927, 11%; 1928, 13%; 1929, 11%; 1930, 13% (plus an additional liquidating dividend of 41.67%); 1931, 12%; 1932, 10%.

Appellant claims that the Secretary's estimate that the rates fixed in his order will yield an annual return of $195,564 is excessive. This claim is based in part upon the contention that the Secretary's allowance for an annual deduction from operating expenses for repairs and depreciation reserve of $80,000 is insufficient and that in addition to an allowance of $38,500 for repairs there should have been an allowance of $100,000 for depreciation reserve alone. Between 1915, when appellant's depreciation reserve account was established, and 1932, appellant transferred to the depreciation reserve account an annual average of $104,859. As a result, at the end of 1932 appellant

had built up a depreciation reserve of $1,887,469, against which during the entire period, deductions for retirements had been made to the extent of only $116,405.86, leaving at the end of 1932 a net balance in the depreciation reserve of $1,771,063.64. In the light of this record it will be argued that the Secretary's allowance of $41,500 annually for depreciation reserve, in addition to the unchallenged item of $38,500 for repairs, is more than adequate.

The remainder of appellant's contentions as to the inadequacy of the Secretary's rates to yield a constitutionally fair return revolve about estimates as to the volume of business reasonably to be anticipated which will be developed in detail in the portions of the argument devoted to that question.

In view of the fact that the record fully sustains the Secretary's order on any theory of judicial review, the question of the scope of judicial review is not material in this case.

Other lesser questions have already been stated under "Questions Presented." A more detailed summary of the Government's position on all of these questions follows:

I. The Secretary's Determination of the Fair Value of Appellant's Property Used and Useful in the Rendition of Stockyard Services Should Be Sustained

A. The value of property which appellant may own but not use in the rendition of stockyard services (as defined in Section 301 (b) of the Packers and Stockyards Act, 1921) should not be included in the rate base. The Secretary, in determining

upon a proper rate base, excluded therefrom the value of various tracts of land owned by appellant, but on this appeal appellant only challenges the lawfulness of the exclusion of the value of the Transit House, a commercial hotel owned by appellant, and the land on which it is located. The Transit House is an old hotel built at a time when there was not convenient access for appellant's patrons to the business section of St. Joseph. It is operated by a lessee at a rental less than adequate to pay taxes, insurance, and upkeep, and for years it has been a losing business proposition. The general ratepayers who use the stockyard facilities should not be burdened by higher rates to support a losing commercial enterprise which the evidence clearly shows is very little patronized and is not necessary under present conditions as a service to shippers. While appellant may, within the limits of its charter power, engage in any enterprise it desires, losses from collateral enterprises should not be paid by the general ratepayers, when, as in the case of the Transit House, such enterprises are plainly not stockyard services.

B. The fair value of Zone A (appellant's land was divided into a number of zones by the appraisers and all were valued, but the Secretary's finding of the value of Zone A is the only finding of land value challenged on this appeal) is not more than $6,969.60 per acre or 16¢ per square foot—the value adopted by the Secretary for rate-making purposes. The evidence would have warranted a lower valuation, and in adopting

16¢ per square foot the Secretary was liberal. The appraisers upon whose testimony and appraisal reports appellant relies to support its contention that a higher value should have been reached employed methods that are erroneous under the decisions of this Court in the *Minnesota Rate Cases,* 230 U. S. 352, and *Clark's Ferry Bridge Company* v. *Public Service Commission of Pennsylvania,* 291 U. S. 227.

C. The Secretary took as the sole measure of structural value reproduction cost new less depreciation. In using reproduction cost, without giving weight to other factors such as original cost, the Secretary was *per se* liberal. The engineers for appellant and for the Government were in substantial agreement on the cost of reproduction new, the only issue between them being that of the estimate of accrued depreciation, or of the percent condition of the property. The Secretary found that the percent condition of the property was 76.04%, although appellant claimed that it was 89%. On the basis of appellant's claim, the amount of accrued depreciation was only $337,437, although appellant has a net accumulated balance in its depreciation reserve of $1,771,063.64. The disparity between the net accumulated balance in the reserve and the amount of accrued depreciation claimed on the physical structures is notable. Appellant's only attack, however, upon the Secretary's finding of percent condition is that it is not supported by legal evidence. At the first hearing the chief engineer who testified had personally in-

spected the structural property. At the second hearing, he testified to a present percent condition not materially different from the percent condition which he had earlier reported. His opinion at the second hearing was based upon an average of the percents recommended by five of his assistant engineers who had personally inspected the property. These five assistants were offered for cross-examination, but appellant did not ask to have them take the witness stand. Since the opportunity to cross-examine these assistants was given by the Government and declined by appellant, appellant has no ground for claiming that no legal evidence was offered at the second hearing on percent condition. Moreover, the question cannot even be raised with respect to the testimony at the first hearing, which also supports the Secretary's finding.

D. The Secretary's valuation includes a substantial amount for going concern value, which is inextricably interwoven with other values that were made on the basis of a plant in successful operation. Also, the liberality of the Secretary in using reproduction cost as the measure of structural value without giving consideration to other factors, such as original cost, is obvious in the case of a plant erected in the 1890's. Other instances of liberality, such as in the rate of return, clearly leave in the rate base an unlabeled margin adequate to cover the going concern element. No separate additional allowance was made for going concern value, and

none *per se* is required. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California,* 289 U. S. 287; *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 290; *Columbus Gas & Fuel Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 398, and other cases. The only specific evidence of going concern value offered by appellant was that of a witness whose testimony was wholly speculative and theoretical and subject to even greater criticism than that directed by this Court at the past deficit method in *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388.

II. The Maximum Rates Prescribed by the Order of the Secretary Are Sufficient to Yield a Fair Return on the Fair Value of Appellant's Used and Useful Property

A. The amount allowed by the Secretary from gross revenues to cover repairs and a reserve for depreciation is more than sufficient for appellant's needs. Appellant's property has reached a normal service condition and the history of its repair and depreciation accounts is a fair criterion of future needs. This history shows a policy of maintenance and replacement of worn-out parts out of the repair account over a period of many years. During this period a huge reserve for depreciation has accumulated and withdrawals from it for retirements have been negligible. Indeed, between 1915 and 1932 appellant charged on its books $1,887,469.50 to depreciation reserve and withdrew therefrom for re-

tirements only $116,405.86, leaving a net accumulated balance in this account on December 31, 1932, of $1,771,063.64. Through a capital stock dividend appellant, in 1923, increased its outstanding capital stock from $2,500,000 to $3,750,000, and then, in 1930, through a liquidating dividend, paid off half its capital stock, leaving capital stock outstanding of $1,875,000. During the depression years covered by the record, appellant paid annual dividends to its stockholders of 10 percent and 12 percent, respectively. The inference is inescapable that the depreciation reserve carried on the books is far in excess of depreciation needs, and that it has been used to support extraordinary financial returns to the investors. The Secretary's allowance is a very liberal one, more than ample to meet needs demonstrated by a study of appellant's depreciation history for eighteen years. The Secretary did not follow any theoretical method of ascertaining a fair allowance (although appellant's argument is largely an attack on the sinking fund method, which the Secretary did not use). The present case presents a very close parallel to the facts involved in *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151, and the holding of this Court in that case is squarely in point.

B. The schedule of maximum rates and charges prescribed by the Secretary includes a charge for livestock resold or reweighed for purpose of sale amounting to one-half the charge prescribed for livestock received by vehicle or on foot. This

charge (except as to calves) is exactly the same as appellant had previously been charging, but appellant's charge was limited by its published tariff to livestock resold in the commission division, whereas the prescribed rates permit it to be applied to resales regardless of the division of the stockyards in which they are made. These resales are largely made by traders in the traders' division, and it is proper that they should pay a charge, otherwise the cost of carrying the traders' division is borne by the general rate payers who do not use it. The Secretary's estimate of the volume to which such charge would apply is reasonable, and is amply supported by the evidence. A somewhat similar charge to be collected by market agencies was made in the order upheld in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

C. Appellant owns feedlots which are physically separate from the main stockyard area and in which livestock not ready for slaughter may be fed. These feedlots are used for periods ranging from 30 to 100 days per head. Appellant previously has imposed a separate charge for use of these feedlots which has been so low as to amount merely to a nominal per head charge—much lower than the general yardage charge for use of the principal facilities of the stockyard (although livestock using the latter is seldom yarded for more than a day or so). The Secretary found that the feedlots should bear a greater amount of their carrying cost, and

that it was unreasonable and discriminatory to require the general ratepayers to pay in higher rates for the maintenance of feedlots which they do not use. Hence, the prescribed maximum rates for the feedlots are somewhat higher than the existing rates for these facilities, and it is estimated that the prescribed maximum rates are high enough to permit the feedlots themselves to pay a fair return on their own fair value. This is eminently fair and reasonable. The Secretary's estimate of the volume of livestock that may reasonably be expected to use these facilities annually is amply supported by the evidence.

D. The rates and charges prescribed are more than sufficient to produce a fair return on the constitutional fair value of appellant's property. As applied to the fair value found by the Secretary, the rates prescribed will produce approximately 7.13% of such fair value. Not only can the prescribed rates be tested with reference to the volume of business used as a rate factor in the order, but they can also be tested with reference to actual receipts during a six-year period shown in the record, 1927–1932. This six-year period covered a wide range in business activity from that of extreme prosperity to that of extreme depression. It is a fair test period. As applied to the business of such period, the prescribed rates would have yielded an average net return of 9% of the fair value of appellant's property. If the exception-

ally abnormal year of 1932 is omitted from the test period, the prescribed rates would have yielded an average annual net return of 9.7% for the years 1927–31. Although as a matter of law rates should not be tested with reference to only a single year, especially when that year is shown to be abnormal, even in 1932 the prescribed rates would have yielded a rate of more than 5.6% on the fair value of appellant's property, notwithstanding the marked abnormal recession in business that year.

### III. Miscellaneous Questions

A. The prescribed maximum rates and charges are adequately supported by the findings which include findings with respect to the services rendered and the rates charged therefor under the existing schedule; the used and useful character of appellant's property; the valuation of the used and useful land; the value of appellant's structures based on cost of reproduction new less depreciation; the amount necessary to be allowed for working capital; going concern value; fair value of the property as a whole; fair rate of return; reasonable net operating income; reasonable operating expenses; volume of business; reasonableness of existing rates; and concluding with a schedule of maximum reasonable rates. The order also contains an application of those rates to the volume of business shown by the record to be reasonable. These findings are legally sufficient to support the order.

B. The various prescribed maximum rates and charges are fair and reasonable in their relation to each other, and the specific reductions which the Secretary prescribed are fair and reasonable. The Secretary took into account certain losses of revenue incident to the trend in receipts from rail arrivals to truck arrivals, and accordingly in the prescribed rates allowed a differential in favor of arrivals by truck in order to offset this loss. This differential was gauged to offset approximately the loss of revenue incident to this shift and it is manifestly fair in view of what the record shows. While it is true that there is some percentage variation between the reduction in the yardage rates for handling different species of livestock, this fact in itself is immaterial. In addition to cost of handling the different types of business, the Secretary had to consider the value of the service, and this factor was duly weighed. The rates were prescribed with a view to producing a fair return on the fair value of appellant's property as a whole, and the accomplishment of this end did not require the allocation of general costs to every specific service rendered or function performed by appellant.

C. The findings of the Secretary which were made in 1931 and which were based upon evidence received at the 1929 hearing were not *res judicata* when the Secretary prescribed maximum reasonable rates in 1934 following the reception of additional evidence at a second hearing in 1933. This

would have been true had the order based on the findings made in 1931 been valid. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 445. *A fortiori* it is true when the order based upon the findings made in 1931 has been set aside by the District Court (*St. Joseph Stockyards Co.* v. *United States,* 58 F. (2d) 290), and has also expressly been vacated by the Secretary. The 1931 findings and order have been nullified and they have no standing whatever in this case, although the record of the first hearing is part of the record here. The District Court, in the suit involving the first order, expressly declined to pass upon the merits of the Secretary's finding, and decided the case solely on the finding of error by the Secretary in denying a petition for rehearing (presented in February 1931), basing such decision upon additional evidence presented to the court. The decision was made on the authority of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248. The findings made in 1931 are irrelevant and immaterial in the present case.

D. A petition to the Secretary for reopening and further hearing, filed in February 1934, was properly denied. Its allegations related to (1) the enactment of the Agricultural Adjustment Act, (2) the enactment of the National Industrial Recovery Act, (3) the Government's monetary policies, and (4) certain alleged decreases in net income in 1933. Those allegations relating to the effect of new legislation and governmental policies were, at the time

they were presented, wholly speculative. The allegations with respect to 1933 net income did not present such radical changes as, if they had been proved, would have warranted a rehearing. To have granted this petition would needlessly have prolonged the proceeding and would have disenabled the Secretary effectively to function under the Act. The situation presented was comparable to that in *United States* v. *Northern Pacific R. R. Co.*, 288 U. S. 490. The petition for reopening and further hearing was properly denied.

E. The position taken by the District Court with respect to the scope of judicial review is not reversible error. The Secretary is a tribunal appointed by law and informed by experience to determine reasonable and nondiscriminatory stockyard rates and his findings, based upon evidence, are entitled to great weight. Constitutional rights are adequately protected, if the reviewing court examines the evidence and in the light of that examination does not find that "the evidence requires the conclusion that * * * the result is confiscation", *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287. The issue in this case is not the reasoning of the lower court in reaching its conclusion that the prescribed rates are not confiscatory, but whether those rates are in fact confiscatory. So far as the validity of the order herein challenged is concerned, the scope of review below is not here in issue inasmuch as a clear preponderance of the evidence shows that the maximum rates

prescribed are fair, reasonable, nondiscriminatory, and not confiscatory.

## ARGUMENT

### I. The Secretary's Determination of the Fair Value of Appellant's Property Used and Useful in the Rendition of Stockyard Services Should be Sustained

#### A. The commercial hotel known as the "Transit House" is not used and useful in the rendition of stockyard services and the action of the Secretary in excluding the value of the Transit House from the rate base was lawful

(Appellant's Brief, Point XI, p. 104)

At the outset the question arises as to what property is employed in the public service which, in a case like the present, means what property is used and useful in the rendition of stockyard services. It is only the value of property that is thus used and useful that should be included in the rate base. Time and again this Court has reiterated that a business subject to rate regulation is entitled only to a fair return upon the fair value of its property at the time it is being used for the public service. *Minnesota Rate Cases*, 230 U. S. 352, 434; *San Diego Land and Town Co.* v. *National City*, 174 U. S. 739, 757; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41; *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 690; *Houston* v. *Southwestern Bell Telephone Co.*, 259 U. S. 318, 324; *Los Angeles Gas and Electric Corp.* v. *Railroad Commission of California*, 289 U. S. 287, 310–311.

Indeed, appellant does not challenge this general proposition, nor does it contend that it is entitled to a fair return on the value of all of the property which it owns. At the time of the second hearing appellant owned 371.5 acres of land and conceded that approximately 182 acres thereof were not used and useful in the rendition of stockyard services (R. 47). At the hearing before the Secretary appellant claimed that approximately 189.5 acres of its land were used and useful (R. 47), but of this the Secretary found that only 101.248 acres were used and useful, and that approximately 88 acres were not so used and useful (R. 69).*

In the District Court appellant challenged the Secretary's exclusion from the rate base of the value of the 88 acres of land found by him to be not used and useful, and the structures thereon. The District Court considered in great detail appellant's contentions with respect to the various properties the value of which had been excluded by the Secretary, and concluded (with certain minor exceptions not material, and not affecting the final result) that the Secretary's determination as to the used and useful character of appellant's property was amply sustained by the evidence (R. 918–927). Although on the question of the law-

* The Secretary's findings on this point were made in square feet instead of acres, but his findings in square feet were the equivalent in acres of the amount shown above (43,560 square feet to an acre).

fulness of the Secretary's findings as to used and useful property, the District Court upheld the Secretary in every material respect, appellant has only assigned as error the court's holding with respect to one piece of property—the Transit House.*

The question presented in this aspect of the case is whether the Transit House is performing a stockyard service within the meaning of the Packers and Stockyards Act. Section 301 (b) of the Act defines stockyard services to mean "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." It is submitted that the maintenance of the Transit House is not the performance of such a service.

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* As to the Transit House, the District Court found as follows (R. 918–919):

"This tract is a piece of land having 15,805 square feet occupied by a hotel called the Transit House. This is a commercial hotel patronized principally by shippers to the yard and by drivers of trucks carrying live stock to or from the yards. The contention is that this property should be included in the rate-base value because it is a necessary convenience connected with the yards' business. While the yards are some distance from the hotel section of the city proper, there is no sufficient showing of any reason why other hotels and lodging houses could not be used by those having business with the stockyards. It would have to be shown very clearly that the business of the yards would be materially affected by the absence of a near-by hotel before it could be said that the maintenance of such was so related to the yards business as to make it proper to be included in the rate for yard services. There is no such showing here, and the exclusion thereof by the Secretary is sustained."

The Transit House is located on land owned by appellant and is leased to an independent operator and conducted as a regular commercial hotel (R. 408). It was constructed many years ago at a time when hotel facilities were not available in the vicinity of the stockyards and when there was no ready transportation to the city (R. 230, 234). At the time of the construction of the Transit House, there were difficulties connected with getting up town, but with better paving and automobiles those difficulties are not now so great for most of the patrons (R. 230, 272). It was built to accommodate patrons of the stockyards and was originally operated by appellant (R. 271). While it had this original purpose, it is not used exclusively by employees or patrons of the stockyards. Anyone who patronizes the Transit House pays the lessee who operates it the regular rates for the services rendered by the lessee as a hotel proprietor (R. 408).

While the presence of a hotel in the stockyards area has no doubt been a convenience to certain persons, it does not follow that this makes it a stockyard service. Indeed, the maintenance of other business institutions, such as stores, banks, theaters, barber shops, and recreational halls, in the neighborhood would no doubt be a convenience and perhaps, in the view of some, a necessity. But the need for these enterprises, if it exists sufficiently, would in normal course be fulfilled by other persons or institutions. If others did not respond sufficiently to fulfill this need, appellant, of course, could engage

in these other businesses (within the limitations of its charter power) to the extent that appellant found it worth while to do so. Appellant thus could own and operate (or own and lease) hotels, stores, and other like facilities to serve its employees and patrons. But the ownership or operation of these facilities naturally would constitute separate business enterprises conducted for profit and would not become stockyard services to be maintained at the expense of the ratepayers as a whole. There is no issue in this case of appellant's right to own or operate a commercial hotel. The question is merely whether the value of that hotel must be included in the rate base upon which rates payable by all of the patrons of the stockyards (whether they use the hotel or not) are predicated.

The maintenance of a commercial hotel has not customarily been considered to be a stockyard service, and few of the leading stockyards undertake to maintain hotels for their patrons even though their yards are located some distance from the business section of the city (R. 209).

At the time of the first hearing before the Secretary it appeared that the Transit House was leased for a rental of $1,200 per year under a contract whereby the books of the lessee were open to appellant's inspection, and whenever it appeared that the business transacted warranted an increase of rental, the rental might be raised (R. 271–272, 845). At the time of the second hearing the business had not justified an increase (R. 845). The president

of the Company stated at the second hearing that the income to the operator would not justify a rent increase, and that taxes and depreciation and other items had more than absorbed the $1,200 per year rent which appellant received (R. 845).

The Secretary found that the decadence of this property as income-producing property had resulted from the development of good roads, motor vehicles, and the street-car system, which connects the stockyards with the main business section of St. Joseph, as well as the change which has come about in the method of transporting livestock (R. 67–68).

The Transit House thus does not pay for itself and does not produce for appellant revenue enough to pay taxes, insurance, and upkeep, to say nothing of a return upon its value. If the value of the Transit House were to be included in the rate base, the general patrons of the stockyards would have to contribute, in higher rates, money sufficient to yield a fair return upon approximately $120,000, which appellant claims to be the value of this property. If the value of this property were to be included in the rate base, the effect would be to levy an annual charge upon the general shippers to the stockyards (many, if not most, of whom do not personally accompany their livestock to market, and very few of whom use the Transit House) to maintain a commercial hotel at non-compensatory rates for the special benefit of a few patrons of the market and such members of the general

public as care to avail themselves of the low-priced accommodations.

It is submitted that the Secretary's findings with respect to the Transit House were lawful and that the District Court's holding on this point was proper.

B. THE SECRETARY'S FINDING THAT THE VALUE OF THE LAND IN ZONE A IS 16¢ PER SQUARE FOOT SHOULD BE SUSTAINED

(Appellant's Brief, Point XV, p. 159)

The Secretary's findings of the value of appellant's used and useful land, for each of the several zones, are summarized in paragraph 121 of the order (R. 88). Although there were eight zones found to be used and useful, appellant challenges the Secretary's finding of the value of only one of them—Zone A—which, however, is by far the largest zone. The Secretary found that the 3,003,973 square feet of land in Zone A has a fair value of 16¢ per square foot, or a total value of $480,635.68 (R. 83–84). Appellant contends that the true value of the land in Zone A is at least $275,164 (or about nine cents per square foot) more than the fair value determined by the Secretary (R. 153).

At the first hearing testimony on land value was given by two witnesses for appellant, W. E. Spratt (R. 235–264) and F. M. Atkinson (R. 265–270), and by one witness for the Government, W. L. Mack (R. 183–206). These witnesses were engaged in

the general real estate business in St. Joseph.* Spratt and Atkinson both placed a value of 30¢ per square foot on Zone A (R. 246, 266). Mack placed a value of 35¢ per square foot on this zone for its special stockyard use, and 20¢ per square foot for general uses if the stockyards had not been located on it (R. 185–186).

At the second hearing testimony for appellant on land value was again given by Spratt (R. 768–796), and also by T. J. Quinn (R. 796–813), and for the Government by John A. Zelinski (R. 472–568). Spratt placed a value of 26¢ per square foot, and Quinn a value of 35¢ per square foot on Zone A (R. 770, 801). Zelinski valued it at $5,000 per acre, or 11½¢ per square foot ** (R. 490).

In preparation for the second hearing, with which we are now primarily concerned, Spratt, Quinn, and Zelinski collaborated in making an analysis of data with respect to sales and leases of property adjacent to and in the general vicinity of the appellant's stockyards. In each instance they obtained such information as was available from public records, and also additional information by interviews with grantors, grantees, and others who

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* The qualifications of these witnesses to testify on land value are given in the record (Spratt, R. 235–236; Atkinson, R. 265–266; Mack, R. 183–184).

** Spratt's second appraisal is respondent's Exhibit 132 (R. 769–770), Quinn's appraisal is respondent's Exhibit 134 (R. 801), and Zelinski's appraisal is Government Exhibit 128 (R. 489–490).

were familiar with land transactions in the vicinity. In this manner they made an analysis of approximately 147 different transactions (Gov. Ex. 128). Each appraiser made his own independent deductions and arrived at his independent conclusion as to the value of appellant's land (R. 771).

*Factors Taken Into Account by the Appraisers*

In considering the differences in the various appraisals notice should be taken of the factors which influenced the several appraisers and guided their judgments.

Zelinski made a thorough study of the location of appellant's stockyards, available railroad facilities, highways, topography of the land, and other factors serving to furnish a background for making an appraisal (Gov. Ex. 128). In his report there are incorporated the sales data which were assembled by the three appraisers. He stated that it was his endeavor "to base his values upon the values of similar adjacent and/or adjoining property" (Gov. Ex. 128, p. 2). He further stated that "the level of values established is not as low as might be contended for in a period such as that during which the appraisal was made, neither is it as high as might be established on the basis of the levels prevailing in the years from 1925 to 1929 inclusive" (Gov. Ex. 128, p. 16). He testified that the values which he "placed on these separate zones do not in any instance represent stagnation values" (R. 489). It was his opinion that the land in Zone A

could not have been sold under conditions at that time to produce the price at which he appraised it. (R. 489).

After gathering sales data, Zelinski "made a study of the use of the property on the ground" and "gathered such statistical information as * * * might have a bearing on the general value situation in the territory." He "interviewed the engineers at the City Engineer's Office and the Highway Department as to the nature and kind of improvements that served the city and the general territory, interviewed the Army Engineer's Office in Kansas City as to the nature and kind of improvements that were proposed for the river, what was being done in the way of protection and abutment work, what the records of the engineering department showed as to the condition of the river is so far as high and low water is concerned, as far as that might have a bearing on the values of the land in the general territory * * *" (R. 477). Zelinski then studied the zoning of the stockyards and after conference with appellant's appraisers reached the conclusion that the zoning which had been used in the previous proceeding would be satisfactory (R. 477). In his investigation Zelinski "personally viewed and studied each and every zone as shown on the map" (R. 478). He testified that the "transfers of property which took place within the general vicinity of the stockyards lands * * * are the data" which he had before him at the time he was arriving at his "con-

clusions as to the values of the individual zones" (R. 480). He "endeavored * * * to restrict the information purely to actual transfers of property and leases of property which might be indicative of value of the particular property that was covered." He "interviewed the parties to the transfer wherever they were available, or at least one of the parties, to verify the bona fides of the transfer to the extent that it was possible to do so" (R. 481). He testified that "in so far as the sales of industrial properties themselves were concerned, such as, for example, sales 6, 5, 3, 4, and 11, sales of that type", he "gave those consideration in making up" his "mind as to a level of industrial values in this general vicinity * * *." With respect to transfers like 19, 20, and 21, which are leases of areas of a semi-retail nature, he "gave consideration and some weight as to the sales as being applicable to a small portion perhaps of the areas of the respondent's [appellant's] lands, but as not being indicative of large industrial holdings held in what might be called assembled areas, such as Zones A, B, and C" (R. 482).

In testifying specifically as to the value of Zone A, Zelinski stated that this is the "zone upon which are located the major facilities of respondent such as the Exchange Building, the loading and unloading docks, the cattle, hog, and sheep divisions for the receipt and holding of livestock for immediate sale and related facilities." It was his opinion "that each and every portion of that

zone is" not "equally valuable." He testified that if he "cut out individual portions of that zone" he "might have a materially higher unit, and certain other portions might have materially lower units than $5,000 per acre." He "considered the land as being stripped of superstructures now thereon" and "stripped of such substructures as appeared in the engineer's inventory." However, he considered that certain "substructures such as those belonging to the public utilities of water and gas and electricity and items of that kind were available" (R. 486). In other words, Zelinski "considered the other superstructures and substructures thereon which were not owned by respondent as either remaining in place or available * * * to the land" (R. 486, 487). He "considered the land at its present grade * * * and as having all of its surrounding environments and facilities such as railroads, packing plants, availability of electricity and water, gas, proximity of the retail district of South St. Joseph and all of the surrounding conditions as existing just as they do today" (R. 487). Zelinski testified that he did "not consider the element of intensity of use in connection with this valuation except in so far as it is impossible to divorce one's mind from what goes on on a property." He "investigated intensity of use in connection with the determination of activity in the abutting properties" (R. 502). As a foundation and background for what he thought appellant's lands were worth, he

was trying to get into his mind "the range of values for the abutting and adjacent and adjoining lands" (R. 503).

Zelinski gave weight to five parcels or groups of sales which in his opinion had bearing in connection with the value of Zone A. One of those known as "sale 5" conveyed 0.31 of an acre to the St. Joseph Warehouse and Cold Storage Company, whose plant lies directly west of part of Zone A. The tract sold lies west of the plant of the purchasing company and was acquired in 1919 at the rate of $5,000 per acre or approximately 11.5¢ per square foot. While there was some relationship between the grantor and the grantee the circumstances were such as to lead Zelinski to believe that the purchase price reflected the real value (R. 518, 533; Gov. Ex. 128, p. 53).

The second sale, known as "No. 10", consists of a tract of land formerly a part of appellant's Zone N and just a short distance north of the northeast corner of Zone A. It contains 4.2 acres and was purchased in 1930 by the Union Terminal Railway Company from appellant. The consideration was $3,000 per acre, or a little less than 7¢ per square foot (Gov. Ex. 128, p. 58). In 1929, 1.2 acres of this tract was leased to the Shell Petroleum Corporation for an annual rental, which capitalized at 7% represents a value of $3,000 per acre (Gov. Ex. 128, p. 66). In the same year, another portion of it was leased to the Painter Oil Company at a rental

which so capitalized amounts to a value of $4,280 per acre, or less than 10¢ per square foot (R. 527; Gov. Ex. 128, p. 67).

The third group consists of sale 11 to the Larabee Flour Mills Corporation, sale 12 from appellant to an agent of the Union Terminal Railway Company, and sale 14 from such agent to the Larabee Flour Mills Corporation, the latter covering a portion of the land heretofore included in sale 12. These three tracts, 11, 12, and 14, lie immediately west of petitioner's Zone N, 11 being the most northerly of the tracts and 12 the most southerly and nearest to Zone A (R. 529–533). With this group, Zelinski considered 3 and 4 which lie immediately west of 11 and 14 and constitute the site of the St. Joseph Public Elevators (R. 533; Gov. Ex. 128, pp. 51–52). Sale 11, consisting of 5.74 acres, was made in 1918, at a price of $2,000 per acre or 4.6¢ per square foot (Gov. Ex. 128, p. 59). Sale 12 involved the conveyance in 1919 of 11.765 acres at $2,000 per acre or 4.6¢ per square foot (Gov. Ex. 128, p. 60). Sale 14 occurred in 1920, the consideration being $3,500 per acre or approximately 8¢ per square foot (Gov. Ex. 128, p. 62). Sales 3 and 4, containing slightly more than one acre, were made in 1920 at the price of $3,000 per acre or a little less than 7¢ per square foot (R. 533; Gov. Ex. 128, pp. 51–52).

The next group of sales were spoken of in the record as the "Grain Belt Mills Sales" and they were designated as "6, 7, and 8." These sales in-

volved three tracts of land lying approximately 800 or 900 feet west of the northerly part of the Cattle Division in Zone A (R. 524–527). Sale 6 consists of 4.71 acres purchased by the Grain Belt Mills at $2,660 per acre or approximately 6.1¢ per square foot (Gov. Ex. 128, p. 54). Sale 7 consists of one-half acre adjoining sale 6. It was purchased by the same company in 1922 at 8.4¢ per square foot (Gov. Ex. 128, p. 55). Sale 8 consists of 0.92 of an acre, adjoining sale 7, purchased by the Union Terminal Railway Company for the purpose of straightening its right-of-way. The consideration was approximately 12¢ per square foot (R. 524; Gov. Ex. 128, p. 56).

The Famo Mills sales designated as "34, 35, 38, 39, 40, and 41" represent the purchase of several lots located within the corporate limits of St. Joseph and having frontage on both the Rock Island Railway Tracks and Cherokee Streets, which is one of the principal retail streets in South St. Joseph. These lots are east of the Exchange Building and the Cattle Division in Zone A and are separated from that zone by the tracks of the Belt Railway and three trunk line carriers. The consideration for these sales varies from 4¢ per square foot to 28.2¢, the weighted average being 14.6¢ (R. 536; Gov. Ex. 128, pp. 81–82, 85–88).

### *Zelinski Applied Correct Principles*

It is submitted that Zelinski applied the correct principles of land valuation and that the evidence

amply supports the results he reached through application of those principles. The brief review of Zelinski's testimony, and the summary of typical sales of similar property in the vicinity, undertaken above, should be sufficient to establish that Zelinski's value is supported by the sales of similar land adjacent or near to Zone A.

This Court, in the *Minnesota Rate Cases*, 230 U. S. 352, said (at pp. 454–455):

> And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, *it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.*
>
> The increase sought for "railway value" in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with

other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, *still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character.* Otherwise we enter the realm of mere conjecture. *We therefore hold that it was error to base the estimates of value of the right-of-way, yards, and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar lands in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays.* [Italics supplied.]

This Court further stated the test to be applied, as follows (p. 451):

But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its *fair market*

> *value* for all its available uses and purposes. *United States* v. *Chandler-Dunbar Water Power Co.*, decided May 26, 1913, 229 U. S. 53. If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. *Mississippi, &c. Boom Company* v. *Patterson*, 98 U. S. 403; *Shoemaker* v. *United States*, 147 U. S. 282; *United States* v. *Chandler-Dunbar Co., supra. But still the inquiry would be as to the fair market value of the property; as to what the owner had lost and not what the taker had gained. Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195. The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken. [Italics supplied.]

In *Clark's Ferry Bridge Company* v. *Public Service Commission of Pennsylvania*, 291 U. S. 227, an order of the Pennsylvania Commission prescribing a tariff of tolls to be charged on a bridge was challenged. Among other things, it was claimed by the company that there should have been allowed an additional $100,000 in the valuation for "the special value of location." This claim was based upon the reports of the company's engineers to the effect that the location of the bridge was more advantageous than any other point for miles in either direction, because the river was

narrower and the conditions of the river bed more favorable for bridge construction at the place where the bridge had been built. The engineers made their estimates upon what they thought one would be willing to pay for the present site in preference to other sites in the vicinity because of the additional cost of building a bridge elsewhere. In rejecting the company's contention in this respect, this Court said (at p. 238):

> In the determination of the value of its property appellant was entitled to be allowed the fair market value of its real estate for all its available uses and purposes, which would include any element of value that it might have by reason of special adaptation to particular uses. But it was not entitled to an increase over this fair market value by virtue of the public use.

*Appellant's Appraisers Disregarded Principles of Land Valuation Established by This Court*

It is submitted that a fair consideration of the testimony of appellant's appraisers reveals that they gave weight to the special use to which the land in Zone A is being put; to the fact that such land is being employed in rendering stockyard service, a public use; to the present use, rather than to availability or adaptability for use.

Thus, Spratt found that the railroads, packing houses and stockyards are "three enormously large institutions that are all intertwined and interlaced and so bound together and interlocked, and so ex-

ceedingly dependent each upon the other by a mutual business relationship that the three institutions almost constitute one great big industrial proposition" (R. 239). He referred to an "element of potentiality which contributes to all real estate values", and stated that "in evaluating land * * * its future use seems to contribute to its greatest worth" (R. 240).

Atkinson collaborated with Spratt in the making of their 1929 appraisal. They "examined a large number of records of real estate transfers of property adjacent and in the vicinity of the stockyards and of the packing houses" (R. 242). They found that "outside of the Belt Railway circle * * *, the value * * * is much less than that of the allied interests properties" (R. 242). It was their view that "transfers on Illinois Avenue [within the general stockyard area] more correctly reflect and indicate the value of the stockyards land than those of the outlying dormant inactive properties * * *" (R. 242). Spratt testified that they had "not taken these values and literally applied them to the adjoining land but * * * considered them altogether with many other things which" they "took into consideration before reaching" their "final unit value" (R. 242). "In valuing the land of the St. Joseph Stockyard Company" they gave "it the value of the only adjacent similar land, *the packing house land and the railroad property*" (R. 242). Spratt testified that it was "*purely and solely on account of the great volume*

*of business and its profitable and useful occupancy by the wholesale merchants and manufacturers and equally so by the stockyards and its allied industries which breathes the greater values into the land they occupy"* (R. 243). In his opinion, it would be unfair to "judge the value of a live, useful and working property by the value of an idle, slothful, inactive tract which happens to lie adjacent and adjoining, whose potential worth is its greatest consideration, and whose final occupancy may be of entirely different character and purpose" (R. 243). Spratt stated in his report that "when estimating values we do not place very much emphasis on what the land or an industry has yielded profit in the past * * * but * * * we contemplate what the future promises" (Resp. Ex. 132, p. 17). He testified that he did not "include the value of superstructures" but thought "that *having superstructures upon the land increases the value of the land"* (R. 254). He testified that "the income derived from its highest use under good management would have a bearing * * * upon its value for industrial purposes" (R. 255). It was his view that "Outside of sentiment, and of a speculation, *property is only valuable because it produces an income, or returns a profit, or serves a purpose"* (R. 245). Atkinson, who corroborated Spratt's value at the first hearing, testified as follows:

> However ideally located or perfect the setting may be, after assembling this land and the cost of filling the land, putting in water

> mains, electric lights, and sewage system and other tremendous expenditures have much to do with my opinion as to the values of this land for the specific purpose for which it is being applied, I think, forever (R. 267).

That Spratt based his appraisal of Zone A upon a consideration of the fact that it was being intensively employed for a special use is further shown by his treatment of Zone B, which is a tract of about seventeen acres adjoining Zone A. In each of the appraisals Spratt valued Zone B at one-half the square foot value which he placed upon Zone A (R. 253, 770). He testified that Zone B "is of the same character as the land occupied by respondent's hog sheds and has equal railroad service" but that "considering that it is not actually in use by respondent for the immediate conduct of its business but is in waiting, we do not value this tract as high as Zone A" (R. 246). This was because it had "not been brought into its highest and best use" but "*when it has been brought into that use I think it would be worth just as much as the land in tract A*" (R. 260). The testimony of Spratt clearly demonstrates that his valuation of Zone A was influenced by the fact that there was a successful stockyard business being conducted on the land, whereas Zone B was not, he thought, being employed for its highest and best use, hence was worth only half as much as Zone A. He insisted that he valued bare land; yet his own testimony contradicts that statement. At the second hearing

he said that he "followed the same general methods used" in his "1929 appraisal" (R. 769).

Quinn made a separate appraisal and in his report set up somewhat the same general background which furnished the basis for Spratt's appraisal (Resp. Ex. 134). He testified that he "did give the use that the various zones were put to, and are being put to, consideration" (R. 805). In referring to Zone B he stated that "with respect to topography, rail service, and accessibility, this ground is much the same as Zone A which lies immediately to the north" (Resp. Ex. 134, p. 11). He placed a value on Zone B of 15 cents per square foot as compared with 35 cents per square foot for Zone A (R. 801). He said that he could not recount all the reasons for the difference but he testified that he "found it difficult to get away from the fact that people, and the assembling of people, the gathering of people, have a tendency to create values, and certainly in Zone A that is one factor that probably is accountable for the difference of 20 cents, as much, probably as great a factor as any that I can think of at the present time" (R. 809). Obviously Quinn was not observing the principles enunciated in the *Minnesota Rate Cases.*

*Secretary's Land Value is Liberal Because of Consideration Given Belt Transaction*

Appellant contends that the Secretary erred in the manner in which he analyzed the sale of the Belt Railway (Br. pp. 164–165). The Belt Rail-

way lands constitute a right-of-way forming a hollow rectangle with rounded corners and projecting spurs surrounding the main area of the actively used stockyards and the large packing plants (orange coloring on sales map, Gov't. Ex. 128, Supplemental Map 3). At the time of the first hearing and for some years prior thereto, the stock of the Belt Railway Company was wholly owned by appellant, and the railway was operated under the direction of appellant's executives (R. 257). Appellant owned the land which constituted the right-of-way of the Belt Railway and leased it to the railway company (Gov. Ex. 135, p. 31). In 1923 Spratt appraised appellant's land leased to the Belt Railway as a right-of-way (Gov. Ex. 135, p. 5). Spratt obtained his value of the Belt land by comparing it with appellant's adjoining land, but in doing so he capitalized at 6% the income derived by appellant at its then prevailing rates. Thereupon appellant, whose officers were the same as those of the Belt Company, leased the land to the Belt at a rental which would produce 6% of the value thus found (R. 244). In 1929 Spratt appraised Zone A at 30¢ per square foot based primarily upon the valuation theretofore found for the railway right-of-way (R. 244, 257). So up to this point it is obvious that the whole value of the stockyards land and of the right-of-way had been calculated by Spratt upon a capitalization of the stockyard company's earnings under the then existing rates—

obviously a fallacious method when rates themselves are fixed by regulatory authority.

In 1929 appellant and the Belt company entered into an arrangement whereby the title to the right-of-way was transferred from appellant's books to those of the Belt at a stated consideration which was the same as the appraised value placed upon the right-of-way by Spratt in the method above described (Gov. Ex. 128, p. 109; Resp. Ex. 132, p. 16). In the same year appellant sold to outside interests the entire capital stock of the Belt (R. 74–75; Resp. Ex. 132, p. 13). But when Spratt, in 1932, came to make a reappraisal of Zone A he relied upon the the consideration stated in the mere paper transaction between appellant and its subsidiary, rather than upon the later sale to outside parties.

In 1930 there was a recapture proceeding pending before the Interstate Commerce Commission involving excess income of the St. Joseph Belt Railway Company. In this proceeding Spratt and others testified that the total value of the Belt property for rate-making purposes in the year 1928 was $2,500,342 (Gov. Ex. 135, p. 158). In reaching this valuation he had included the land at 30¢ per square foot (Gov. Ex. 135, p. 25).

In the fall of 1929, however, had occurred the above-mentioned sale of all the Belt Line properties for $1,500,000 (Resp. Ex. 132, p. 13). The transfer of ownership was effected by a transfer of the entire capital stock, there being no other securities outstanding. The actual sale of the prop-

erty, therefore, was at a price which was 60% of its value as appraised by Spratt and others. There is nothing in the record to indicate, and it is not to be presumed, that this discrepancy between the appraised value and the sale value applied in any greater or less degree to the land than to the other elements of the property. It is reasonable to conclude that the sale value of the land was 18¢ per square foot, that is, 60% of the 30¢ per square foot estimated by Spratt. Thus the use of this Belt property as a criterion would point to a value midway between the 26¢ testified to by Spratt and the 11.5¢ testified to by Zelinski.

The Secretary thought that consideration of the Belt Railway transaction furnished some warrant for finding a higher land value than that testified to by Zelinski. Spratt, in 1929, had thought this property was worth 30¢ per square foot, and in 1932 he thought it was worth 26¢ per square foot. If the value in 1929 was 18¢ per square foot, and this value is decreased by the same ratio as Spratt decreased his appraisal of 30¢ the result would be 15.6¢ per square foot as the value of the Belt Line property in 1932. On the record as a whole, giving full consideration to the testimony of Zelinski and to the Belt transaction, the Secretary found that 16¢ per square foot was the fair value for rate purposes of Zone A. It is submitted upon the foregoing analysis of the evidence that this finding is liberal.

Appellant contends that in considering the Belt Railway transaction the Secretary erred as to the amount of land involved. The Secretary used 91.41 acres, which was the amount claimed by the Railway in the proceeding before the Interstate Commerce Commission (Gov. Ex. 135, p. 31). However, it is not material here for the reason that the Secretary mentioned 91.41 acres merely to describe the land, and not as a basis for a calculation (R. 81). *It was, moreover, the analysis of the Belt Railway transaction which led the Secretary to find a higher value than was testified to by Zelinski. Even if the Secretary had improperly considered the Belt Railway transaction, at least the effect thereof was to give the land in Zone A a higher value than it otherwise would have had.*

*The Secretary Did Not Adopt Stagnation Value*

Appellant infers that the value found by the Secretary was predicated upon a drop in land values of 36% due to the depression (Br. p. 161). No such conclusion can be drawn from any finding in the Secretary's order, and the foregoing review of the evidence shows that *the sales supporting the Secretary's valuation were made, for the most part, prior to the depression when land values were admittedly higher than they were later.*

From the foregoing analysis it is clear that the record would have supported the Secretary in finding 11.5¢ as the square foot value of Zone A.

The evidence shows that Zelinski, who placed a value of 11.5¢ per square foot on Zone A, carefully analyzed the sales of adjoining property or property in the vicinity of Zone A. In contrast to Zelinski's method the evidence clearly demonstrates that Spratt and Quinn gave consideration to factors connected with present earnings on Zone A as it is now operated and used for stockyards purposes.

*The Value of Zone N Supports Value Given Zone A*

Appellant contends that, although the Secretary found a value of 7¢ per square foot for Zone N, the record shows it would cost 18.5¢ per square foot to "fill" Zone N sufficiently to bring it up to the level (and availability for use) of Zone A, inasmuch as Zone N is now several feet lower than Zone A. It is contended that if the 18.5¢ thus required is added to the 7¢ found by the Secretary to be the value of Zone N, the result—25.5¢—is a fair measure of the value of Zone A. In other words it is contended in effect that 18.5¢ represents the difference in value between Zones A and N (Br. p. 174).

It is not a fact (as appellant states) that appellant's claim of 18.5¢ per square foot for filling (based upon a grading cost of $1 per cubic yard) is "absolutely undisputed in the record." The chief valuation engineer for the Government tes-

tified that such grading work could be performed at a cost varying from 26.5¢ per cubic yard to 52.8¢ per cubic yard, depending upon the method used (R. 888–889). Appellant ignores the statement of its own engineer that on the surrounding St. Joseph Belt Railway right-of-way he had accepted a figure of 35.5¢ per cubic yard as the cost of fill (R. 613). Moreover, appellant used this unit cost of filling to support its claim for an increase in value of filled land over unfilled land, in connection with the valuation of the lands of the St. Joseph Belt Railway (Gov. Ex. 135, p. 81). Giving effect to these costs, it is apparent that the fill would, at the very most, cost less than 9¢ per square foot if the entire area of Zone N were filled to an average depth of 5 feet. The record discloses that the 5 foot average fill would be more than sufficient to make Zone N comparable to Zone A (Gov. Ex. 128, Supplemental Map 4; Resp. Ex. 114). These exhibits show that the 5 foot fill applies only to a small portion of Zone N and that 3 feet would more nearly reflect the average fill for the entire zone, but even if a 5 foot fill were necessary throughout, 9¢ per square foot would more than make up the difference in value between Zone N and Zone A. Appellant's witness, Spratt, and also Government witness, Zelinski, testified that the value of Zone N was 7¢ per square foot (R. 490, 770). The Secretary adopted this valuation for Zone N. If the difference of 9¢ per square foot for fill were added to the value of Zone N, as was indicated by appel-

lant's own witness as well as the Government's witness, the result would be 16¢ per square foot, which is the same as the value found by the Secretary for Zone A.

*Conclusion as to Land Value*

Although the St. Joseph realtors who testified for the appellant in the hearing before the Secretary were of high standing in their vocation, their opinions had no such conclusive force that there was error of law in the refusal of the Secretary to adopt them. The testimony of these realtors had "no such commanding quality" as "to apply coercion to the judgment of the appointed tryer of the fact" and exclude other choice. *Dayton Power & Light Co.* v. *Pub. Util. Comm. of Ohio,* 292 U. S. 290, 301.

It is submitted that the evidence in this case would amply support a valuation lower than that found by the Secretary for Zone A. To the extent that the Secretary found a value in excess of Zelinski's value, the Secretary was liberal. Under such circumstances it is submitted that the Secretary's finding should be sustained.

C. THE SECRETARY'S FINDING OF THE COST OF REPRODUCTION NEW LESS DEPRECIATION OF APPELLANT'S STRUCTURAL PROPERTY SHOULD BE SUSTAINED.

(Appellant's Brief, Point XIII, p. 130)

The only question which is raised by appellant in connection with the valuation of the structures concerns the amount of depreciation deducted by the

Secretary from the estimated cost of reproduction new.

It is to be noted that the Secretary adopted reproduction cost as the sole standard of value in connection with appellant's structural property unmodified by any consideration of actual or historical cost. It is furthermore to be noted that there was no substantial dispute between the appellant and the government at either of the hearings over the cost of reproduction new (R. 88–91). In view of the fact that many of appellant's structures were built more than 30 years ago (R. 626) at a time when labor and materials were much cheaper than now, it is obvious that an extremely liberal policy in respect to the determination of fair value was pursued towards appellant. Appellant claims, however, that the amount deducted by the Secretary for accrued depreciation from such estimated reproduction cost new is too great.

The Secretary found that the percent condition of appellant's used and useful structures was 76.04 (R. 104), whereas appellant contends that the percent condition was at least 89 (R. 928). The government engineer, Henrici, testified that the percent condition of the property was 75.82, but after making allowance for additions and betterments, which he did not depreciate, he arrived at a percent condition for all the property, including that found to be not used and useful, of 76.93 (R. 429). Appellant's engineer, Kosters, testified that the percent condition was 89 (R. 600). The deduction for

accrued depreciation on appellant's assumption of an 89 percent condition of the property amounts to $337,437, while on the testimony of Henrici of a 76.93 percent condition the deduction would amount to $648,631.

The only point which appellant now raises with respect to the findings of the Secretary as to accrued depreciation is the technical one that the findings of percent condition are not based upon any legal evidence (Br. p. 130) for reasons indicated below. However, before discussing this point, it is pertinent to compare the $337,437 deduction for accrued depreciation now claimed by appellant with the accumulated depreciation reserve now carried on appellant's books. While it is not expected that the accrued balance in the depreciation reserve will be exactly offset by the amount of accrued depreciation in the property, a too conspicuous disparity between the two figures, especially in the case of a property which has reached a normal operating condition, is at least a subject for comment. As indicated hereafter, *infra,* p. 98, the accumulated balance carried in appellant's depreciation reserve amounted in 1932 to $1,771,063.64. With this figure may be contrasted the accrued depreciation of $648,631 found by the Government witness, and appellant's claim that such amount should be still further reduced to $337,437.

Turning now to appellant's contention that the Secretary's finding as to accrued depreciation is

not based upon any legal evidence, this contention is advanced on the ground that the Government engineer, in arriving at his estimate of percent condition at the second hearing, used an average of the percentages reported by five of his assistant engineers who inspected the property for the purpose of determining its percent condition, and that those assistant engineers were not produced as witnesses (Br., p. 132). Appellant contends that since Henrici was the only witness who testified for the Government on percent condition at the second hearing, and his testimony was based upon an average of the percentages recommended by his five assistants, it is not legal evidence, and that as a result the only evidence upon this point in the record is that of appellant's engineer (Br., p. 132).

Henrici testified at both hearings (R. 211, 419). In making his appraisal prior to the first hearing he personally made a thorough physical inspection of appellant's property, with the aid of two of his assistants (R. 437). For some years he had been the chief valuation engineer for the Packer and Stockyards Division of the Department of Agriculture and he had had a great deal of experience in appraising stockyard properties (R. 211–212). In making an appraisal in 1927 (which was introduced at the first hearing in 1929), each engineer working under Henrici's direction "set down his opinions as to the percent conditions" during "the process of making an inventory." Henrici testi-

fied that "those percent conditions after being inspected by the chief valuation engineer [himself] were discussed with the engineers making them and the final percent condition determined" (R. 213). During the first hearing some revisions were made in the estimates of the percent condition of some of the units of the property as a result of a reinspection by two of the engineers working under Henrici's direction (R. 213). That Henrici used the personal inspection method prior to the first hearing in 1929 is clearly established by the evidence (R. 214).

With respect to the procedure employed in determining the percent condition prior to the 1932 hearing, Henrici testified as follows (R. 428–429):

> After the cost of reproduction new was found, the next step was to ascertain the condition percent of the various structures in order to arrive at the cost of reproduction less depreciation. * * * I stated the principles used in the previous appraisal and the same principles were used in the 1932 appraisal except that I had each of the five engineers furnished with a list of all the property. Each of these engineers put down on paper his conception of the proper percentage condition of that property and this is shown in Government Exhibit No. 114 under columns headed 1, 2, 3, 4, and 5. The numbers refer to my engineers Cushing, Galbreath, Johnson, Schramm, and McClintock. The column

headed "Average" is a mathematical average of the five estimates. These estimates were made independent of each other. One man did not know what the other percentages were until he compiled his report.

Appellant now contends that the Secretary had before him no competent evidence on percent condition other than that of appellant's engineer, because Henrici's testimony at the second hearing was based upon the average of the estimates of percent condition made by these five assistant engineers, who were not called as witnesses.

It is well recognized that in presenting evidence as to appraisals in rate proceedings where the work of making an inventory is greatly involved, the engineer in charge may have a number of engineers assist him; although it is customary for the chief engineer to present the completed appraisal. It is also recognized that these assistants may be required to appear and testify as to the particular part of the appraisal for which each was responsible if occasion makes it necessary. It is customary for the party desiring to examine these assistants to make the demand known some time during the hearing.

The fact is that at the second hearing the Government attorneys offered to produce Henrici's assistant engineers so that they might be cross-examined. Henrici's engineering staff has headquarters at Kansas City, Missouri, only a short dis-

tance from St. Joseph, Missouri, where the hearing before the examiner was held, and his assistants were readily available. Although the Government offered these men as witnesses, appellant's counsel did not avail themselves of the opportunity offered for cross-examination.*

* At the second hearing the Government was represented by Mr. J. S. Bohannan, and appellant by Mr. William N. Strack. Mr. Bohannan appreciated that appellant might wish to cross-examine some or all of Henrici's assistant engineers and he offered to produce them as appears from the following colloquy:

"Mr. BOHANNAN. We offer in evidence Government Exhibit 118, the volume heretofore identified by that number and described by the witness, and lest I forget it again, as I did at the time of offering the appraisal which is Government Exhibit 114, and all the exhibits which have been offered since then, if there be any objection to any of those exhibits on the ground that Messrs. Cushing, Galbraith, Johnson, Schramm, McClintock, Snider, or Bush, who engaged under Mr. Henrici's direction and supervision in the making of those exhibits have not testified, we will produce any or all of those gentlemen for cross examination respecting these exhibits.

"Mr. STRACK. Ask the same ruling, that it be deferred until we have a chance to examine them further.

"The EXAMINER. Ruling will be deferred on Government Exhibit 118 (pp. 482, 483, original transcript of testimony of second hearing)."

Just previous to the time of making this statement the Government had offered in evidence Government Exhibits 114, 114A, 114B, 114C, 115, 116, and 117 and appellant's counsel had asked that ruling be deferred on their admission, which request was granted by the Examiner (pp. 474, 478, 479, 481, original transcript of testimony of second hearing). At the conclusion of Henrici's cross-examination the Exami-

There can be no question as to Henrici's competency, and it is not questioned on this record. His methods and his qualifications for the performance of his work have been carefully considered in

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ner admitted the exhibits in evidence after appellant's counsel made his objections in the following words:

"Mr. STRACK. I am now prepared to state objections to the Government Exhibits 114 to 120, inclusive, which have been heretofore offered in evidence.

"No objection to Exhibits 114, 114–A, B, and C, and 115, other than the general objection we have made heretofore as to the power of the Secretary to find the value of the property of respondent and which we understood was to apply all through this proceeding.

"Exhibits 116, 118, and 119 purport to show comparisons with the appraisal of Stone and Webster Engineering Corporation, and in many instances we have had no opportunity to fully check these, and other than the weight which these exhibits might have, I don't know of any particular objection we would have. I naturally assume that the real test of the comparison, of course, would be the two appraisals themselves, which are put into the record.

"Exhibit No. 117 is immaterial, irrelevant, incompetent. I think the witness stated he didn't use it.

"Exhibit No. 120 is incompetent, irrelevant, and contains self-serving declarations.

"The EXAMINER. Objections overruled, and Government Exhibits 114, 114–A, 114–B, 114–C, 115, 116, 117, 118, 119, and 120 are received (pp. 545, 546 of the transcript of testimony of the second hearing)."

The above colloquy was inadvertently omitted from the narrative statement of the original transcript of record which was prepared prior to submission of the case to the Secretary, which narrative statement forms the basis of the record before this Court on appeal. Appellant's counsel however, have been advised that appellee is citing in this brief the above colloquy from the original transcript of record and they have stipulated that it is a true and accurate statement of what the original record shows, and they have

other cases in which he testified, and have been judicially approved. Henrici followed the same methods of estimating percent condition in his examination of the properties of appellant as he followed in reaching his estimates in the proceedings involving rates at the Denver and Omaha stockyards, which methods were considered and approved by district courts in suits brought respectively by the Denver and Omaha stockyard companies to enjoin the enforcement of orders based in part upon Mr. Henrici's testimony.*

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stated that they make no objection to its use and that it may be considered as though it appeared in the printed record before this Court. A stipulation to this effect has been filed with the Court.

Henrici's appraisal, including the determination of the cost of reproduction new less depreciation is contained in Government Exhibits 114, 114A, 114B, and 114C, which are before this Court as original exhibits. The foregoing statement by appellant's counsel clearly shows that no objection was made to those exhibits on the ground that Henrici's assistants had not been called to testify. It shows not only that appellant's counsel did not object to the competency of Henrici's exhibit covering his appraisal and the fixing of the percent condition of the property, but also that the Government offered to produce Henrici's assistant engineers for cross-examination by appellant's counsel and that appellant's counsel did not accept the offer. Clearly appellant's counsel waived his right to examine these five men with respect to their reports to Henrici on the percentage condition of the property.

* In *Denver Union Stockyard Company* v. *United States*, 57 F. (2d) 735, the Court sustained Henrici's findings of percent condition, saying (at p. 743):

"After arriving at the reproduction cost new of the properties, the Secretary found that the properties were in 83.8 percent condition. Here again there was a conflict between the engineers. Both engineers inspected the properties, and

The element of judgment enters into the determination of percent condition of structural property. Inasmuch as Henrici had carefully inspected appellant's property prior to the first hearing and had given his independent judgment upon its condition, he was in a position to check the composite judgment of his five assistants who inspected the property prior to the second hearing.

It is submitted that the Secretary's finding as to reproduction cost new less depreciation is lawful, and is based upon legal evidence.

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from their informed and skilled judgment made an estimate as to the present percent condition of the properties. The engineer for the petitioner estimated that the properties were in 95 percent condition. *Mr. Henrici, the government engineer, is unquestionably a man of standing in his profession, and his evidence undoubtedly reflects his deliberate opinion.* Both engineers followed the approved method of arriving at their conclusions. *Wichita Gas Co.* v. *Public Service Commission*, 126 Kan. 220, 268 P. 111. When it is considered that many of the structures are more than 40 years old, the Secretary's finding in this respect appears to be entirely fair." [Italics supplied.]

In *Union Stock Yards Company of Omaha* v. *United States*, 9 F. Supp. 864, the Court upheld Henrici's findings as to percent condition. In that case the Court said (pp. 881–882):

"The plaintiff challenges the Secretary's findings that the percent condition of its structural property, allowing for accrued depreciation was, 84.7. The Secretary considered the testimony of an engineer called by the plaintiff and also that of an engineer employed by the government and the findings reflect that he fully appreciated the points of difference between them. It is not questioned that both engineers were men of standing in their profession and both follow, in the main, methods that have been approved by the courts."

D. THE SECRETARY PROPERLY REFUSED TO MAKE A SEPARATE ADDITIONAL ALLOWANCE FOR GOING CONCERN VALUE OVER AND ABOVE THE AMOUNT THEREFOR WHICH WAS INCLUDED IN THE OTHER ITEMS GOING TO MAKE UP THE RATE BASE

(Appellant's Brief, Point XII, p. 109)

It has long been recognized in public utility rate cases that in the valuation of operating properties there is an intangible element of value which inheres in the property because it is a going concern.* Thus this Court stated in *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153 (at p. 165):

> That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use.

The Secretary of Agriculture was fully cognizant of this principle, and in determining upon a rate base gave due consideration to appellant's going concern value. Thus the Secretary said (R. 111, 112):

> That there is an element of value in an assembled and established plant doing busi-

* The many decisions of this Court involving the treatment of going concern value by rate making bodies were recently reviewed and discussed in *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 313–315.

> ness and earning money over one not thus advanced is recognized. * * * Thus, in the rate base herein found, there is included a large amount for going concern value, but such value is so inextricably interwoven with other value that any attempt to segregate it and set it up alone would lead to a conclusion as arbitrary and illogical as usually is found when such attempts are made.

The Secretary's treatment of going concern value is set forth fully in his findings (R. 107–112). From them it appears that, although no separate allowance for going concern value was made, the Secretary adopted valuations of the structural properties as a whole which were based upon the fact of their successful operation, and that the rate base adopted by the Secretary included a substantial amount for going concern value which was inextricably interwoven with other values (R. 112). It further appears from the findings that the Secretary was of the opinion that the evidence offered by appellant did not require or warrant a separate additional allowance for going concern value over and above the allowance for that value included in the valuation of the structural properties (R. 108–111).

Nevertheless, in the present case appellant asserts that the element of going concern value was not included in the valuation adopted by the Secretary, and contends that an additional allowance for going concern value should have been made.

*Appellant's Evidence on Going Concern Value Is Wholly Speculative*

Appellant's contention that an additional allowance for going concern value should have been made must rest, in the final analysis, upon the testimony of one witness, Mr. L. R. Howson, who testified at both hearings (R. 273–333, 850–866). Howson's method of determining an allowance for going concern value consists of an attempt to estimate the cost of reproducing the business which appellant now enjoys, by assuming that some persons find themselves in the peculiar position of having the choice of buying appellant's business as a going concern, or of building an exactly similar property; and that they choose the latter course and appellant immediately goes out of business. Howson's measure of going concern value is the cost to the new stockyard, under these circumstances, of attaching appellant's business. His technique is summarized in his own language and is set forth below.*

* One starting his computation of going value * * * must have the following data: First, the cost of reproducing the physical property as of the date of inquiry; second, how much time in the near future it will take to rebuild the plant, that is an engineering question and has to be estimated everywhere whenever any engineering construction is undertaken; third, how much time it will take after the physical plant is built and ready to operate before it will have a full line of clients, or customers, and a fair normal or proper revenue; and fourth, how rapidly this business will be acquired, or, in other words, how much business can be readily secured, how much more can be secured with a reasonable expenditure of time and effort; and, finally, how much of the business of the

In applying his theory to appellant's business, Howson contended from the experience of the preceding five years that there would be an average yearly business of 54,275 cars of livestock, which would constitute the yearly business to be recovered by the hypothetical new stockyard (R. 280). He obtained speculations from officials of appellant and from representatives of local commission firms

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present company can only be attached by great effort and considerable outlay in cost, if at all. It is also necessary to know the value of money properly secured, and the value of money used in the particular business under consideration; in other words, fair return. It is also necessary to have a knowledge of the recent income growth of the business that is under consideration. Having these data, it is then practicable through the forecasting and comparison of two sets of accounts to compute going value. These two accounts are: first, the income and operating account of the company, as it now exists, forecasted into the reconstruction or reacquirement of revenue; and second, an exact similar set of accounts for a plant not yet conceived, but an exact duplicate, exactly similar in its physical make-up, and in its ultimate business capacity during the period when the physical plant is being reconstructed and the business rearranged. A comparison of these two sets of accounts reduced to present worth, as of the date of valuation or the date of the computation, gives a measure of the going value of the property by the comparative method. It can be visualized in this case by assuming that there is an investor ready, willing, and able on June 30, 1929, the date of valuation, who desires to enter the stockyards business in St. Joseph. His first procedure would be to call upon the management of the present yards, tell him of his desire to go into that business, and ascertain from them if the property can be acquired. They place a price on it which we are assuming is the cost of the physical plant plus their measure of going value. The prospective purchaser takes an option at that price, he then employs an engi-

in regard to the probable period required by a new stockyard to recover this amount of business, and the percentage which would be recovered during each year of the recovery period (R. 280–281). From these estimates Howson decided that it would take five years to recover the business and that "with the rate of recovery established, it is possible through a study of the present income and

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neer to tell him what it will cost to reproduce that property. He, the engineer, estimates the physical cost of reproduction and advises his client as to the results. The client, or the prospective buyer, then returns to the manager of the stockyards company and tells him that he is advised that the property can be reproduced for an amount considerably below that mentioned in the option.. The management of the yards tell him that they are selling more than a physical plant, they are selling a plant with an established business, not only with the capacity for earning but one that is actually earning. The prospective investor is then confronted with two alternatives, he may either buy the existing plant at a price including its going value in which case he immediately steps into the present revenues, or he may decide to build an exactly similar plant, which over a period of time will develop earning capacity equal to that of the existing yards. Assuming he takes the latter course, it will take him a year to build the plant. Obviously, during that period he will receive no revenue from it; the only revenues being from income or idle capital plus that previously allowed as lost interest during construction. Then after the plant is finished, which we will say can be accomplished in one year at a cost estimated as the reproduction cost of the property, he will find that during his year's interval much of the receipts of the yards will have been diverted to other yards, and can only be reattached with considerable effort. By intensive work, however, he assumed that after a period of years all of this business, or its equivalent, can be reattached to the yards, and if at that time the prospective investor, or the

operating accounts to estimate the income and operating costs of the starting plant during the period when it is reacquiring the business'' (R. 282).

Howson adopted the one-year construction period used by valuation engineers as the basis for their calculations of certain overheads, such as interest during construction, and he assumed that during that year all the business theretofore enjoyed by appellant would be dissipated (R. 279). He then undertook to ascertain the period of time which would elapse after the new yard began op-

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builder, as he now is, calls in an auditor and asks him to make a comparison of his financial structure under this building program, as compared to what it would have been if he bought the yards, he will find that the net revenues will have been less than they would have been had he purchased the going or operating yards, by an amount which is the amount computed for going value; that is, the amount he could have afforded to have paid, in addition to the cost of reproducing the physical plant and been even, whichever course he would have pursued. That, as I see it, is a measure of the going value of this property by the cost of reproduction or comparative method. * * * (R. 277–278.)

* * * The computation of going value by this method, which is an estimate of the cost of reestablishment of an income, is largely dependent in amount upon the amount of income of the business to be acquired and the time required for its acquisition. It is therefore necessary to ascertain the facts relative to the income, its growth, the source from which it is derived, and the factors affecting its recovery (R. 280).

* * * Before starting my computation I had to assume some particular amount of going value and I worked it through and tested it out and if my test showed the assumed amount was materially wrong I would have to start all over again (R. 284).

erations before its receipts and resultant income would be equal to those now possessed by appellant (R. 281). He also sought to ascertain what percentage of appellant's present receipts of livestock would be recovered by the new yard during each year of the recovery period and the revenues which would be realized from such receipts (R. 281). He computed the expenses of operation for each of the recovery years by a process of adjusting the variable expenses of the test year in accordance with the volume received in each of the recovery years. He then determined the net operating income for the construction year and each of the recovery years and deducted these amounts from the net operating income of the existing plant for the test year. The sum of the present worth of these differences represents his measure of going concern value (R. 277, 282). At the first hearing he reached the result that appellant had a going concern value of $666,666 (R. 284). At the second hearing he followed the same method but arrived at the result of $294,000, $358,000, or $472,644, depending upon which of several valuations were used and also depending upon what rate of return and what allowance for depreciation reserve were used (R. 853–854).

Stated otherwise, going concern value, according to Howson, is measured by the aggregate of the supposed deficiencies of income which a mythical stockyards would earn during the recovery period

under that which is actually earned by the existing stockyards during the test period.

It should be observed with respect to Howson's theory that at least two of the factors which entered into his computations lie wholly outside the boundary of human experience or knowledge; (1) the length of time necessary for the newly built stockyard to recover the business presently enjoyed by the existing stockyard, and (2) the percentage of the recovery which would take place during each year of the recovery period. Howson admitted that "none of the commission men had ever heard of a case where a group of people decided to build a new stockyards and the old stockyards gave up the ghost and went out of business", nor had any of the officers of appellant ever heard of such a case (R. 294). He did not think that the facts he had assumed ever had actually occurred, and he admitted that he has "never gone through a stockyards business reconstruction, nor has anyone else to my knowledge" (R. 296).

His assumptions as to period of recovery, percentage of recovery during each year of such period, cost of attaching the present company's business to a new stockyards, etc., were at best guess work. The conclusions of Howson with respect to the deficits which might be incurred by a mythical stockyards seeking to start anew under hypothetical conditions and to attach business

equivalent to that now enjoyed by appellant within a given period have no evidentiary value as to going concern value.

Witness Howson has presented his theory in a valuation and recapture proceeding before the Interstate Commerce Commission. *St. Joseph Belt Railway Co.*, 133 I. C. C. 523. In rejecting his theory, the Commission said (at p. 527):

> The analysis of the witness is so replete with assumptions and estimates as to render it worthless for all practical purposes. The whole method consists of a presentation in new form of an estimate of the deficiency below a fair return which the carrier, if reproduced on valuation date, would suffer before it attained the status of a financially successful concern. The theory that the total amount by which the carrier's actual income during its early years fails to yield a fair return on the investment should be added as an element of value for rate-making purposes was condemned by the Supreme Court in *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388. By the stronger reason, hypothetical deficiencies must also be rejected.

Howson also testified in a proceeding before the Secretary of Agriculture in which an inquiry was being made into the reasonableness of rates and charges of the Denver stockyards. In reviewing the order of the Secretary the District Court in Colorado sustained the Secretary's action in rejecting Howson's theory. *Denver Union Stock Yard*

*Co.* v. *United States,* 57 F. (2d) 735. The court in that case said (at p. 743):

> The petitioner introduced the evidence of an engineer who undertook to compute going concern value from a number of assumptions. The engineer assumed that the stockyards was completed, but with no business attached. He then undertook to estimate what it would cost to procure the business which the stockyards now enjoys. The engineer interviewed five men for the purpose of getting their opinion as to the number of years it would take to regain the business. These estimates ranged from 7 to 12 years. The engineer believed that these estimates were too high, and started with the assumption that within five years the business would be attached. Upon these assumptions, he computed the going concern value. This is buttressed by the evidence of certain witnesses that in the past certain expenditures were made for advertising, and by donations of land, which aggregate approximately the same amount. The Supreme Court of the United States in *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388, at page 395, 42 S. Ct. 351, 354, 66 L. Ed. 678, has said: "The fact that a utility may reach financial success only in time or not at all, is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in deciding what the base value is and whether the rate is confiscatory."

Howson testified that his method "is an entirely different process from the past deficit" method (R. 324). He said that he did not approve the past deficit method, and that "the Wisconsin deficit theory is an incorrect method" (R. 324). Nevertheless, his method was strikingly similar to the ones he condemned. It is true that he did not use past realized deficits as a basis for determining going concern value, but he did use hypothetical future deficits. He projected himself into the future and theorized upon possible prospective losses under assumed conditions.

*Speculative Evidence Is Not Sufficient To Require A Separate Additional Allowance For Going Concern Value*

The decisions of this Court do not require an additional perfunctory allowance for going concern value to be inserted in a rate base as a matter of course. Certainly there is no warrant in the decisions for requiring the insertion of a separate allowance for going concern value upon testimony such as Howson's. In *Galveston Electric Company* v. *Galveston,* 258 U. S. 388, this Court upheld a valuation which did not include a separate allowance for going concern value. This Court said (at pp. 394–397):

> The only evidence offered, or relied upon, to support his finding is a capitalization of the net balance of alleged past deficits in

accordance with what was said to be the Wisconsin Rule. * * *

If the rule were that a prescribed rate is to be held confiscatory in case net earnings are not sufficient to yield 8 per cent on the amount prudently invested in the business, there might be propriety in counting as part of the investment such amount, if any, as was necessarily expended at the start in overcoming initial difficulties incident to operation and in securing patronage. But no evidence of any such expenditure was introduced; and the claim of the company does not proceed upon that basis. What was presented by the witnesses are studies, on various theories, of what past deficiencies in net income would aggregate, if 4 per cent were allowed as a depreciation annuity and 8 per cent compound interest were charged annually on the value of the property used.

* * * * *

The fact that a utility may reach financial success only in time or not at all, is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in deciding what the base value is and whether the rate is confiscatory. A company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence in engaging in the enterprise, or of

> errors in management, or of omission to exact proper prices for its output, cannot erect out of past deficits a legal basis for holding confiscatory for the future, rates which would, on the basis of present reproduction value, otherwise be compensatory. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 14. * * *
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> * * * Going concern value and development cost, in the sense in which the master used these terms, are not to be included in the base value for the purpose of determining whether a rate is confiscatory.

Howson's method is obviously more hypothetical and unreal than that condemned in the *Galveston* case. His method, moreover, has points of similarity to that described and criticized by this Court in *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287, in which this Court said (at pp. 318–319):

> The other witness, Mr. Miller, took Mr. Luick's construction program, in which the latter had figured the cost of reproduction, and had assumed that there would be turned over to the operating department "one-twentieth of the service mains during each quarter of the second to sixth years, inclusive." Estimating year by year the cost of securing the business during the construction period, the witness took the difference between 8 per cent interest on the property used and useful during the year and the net earnings estimated to have been received,

> and the total of these differences with interest, during the period assumed to be required, was taken to represent the cost of securing the present business of the Company. This was thus calculated to amount, from the second through the seventh year, inclusive, to $8,721,878. To this sum the witness added as the estimated cost "of organizing property and personnel", $506,789, thus reaching the total of $9,228,667, which the Company claims as going value. It is unnecessary to analyze the testimony of these witnesses, as it is obviously too conjectural to justify us in treating the failure to include their estimates as a sufficient basis for a finding of confiscation.

In *Georgia Railway & Power Company* v. *R. R. Commission,* 262 U. S. 625, this Court had under consideration, among other things, the refusal of the Railroad Commission to include in the base valuation an item of $1,000,000 representing "losses from operations during recent years." In holding that the item was properly excluded, the Court said (at p. 632):

> That past losses are not to be capitalized as property on which the fair return is based was held in *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 14; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388.

This Court in recent decisions has reaffirmed the decision in the *Galveston* case with respect to the inclusion of past deficits as a part of the rate base.

*Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 313; *Columbus Gas & Fuel Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 398. In the latter case the lower court and the Commission had made no separate allowance for going concern value. With respect to the company's claim that such an allowance should have been made, this Court said (at p. 412):

> Thus, some of the appellant's experts have included interest or return unearned during the business development period as a factor contributing to going value, one witness placing this factor as high as $6,300,000. Their method of computation was condemned by this Court in *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388, 394, in very similar conditions.

If past actual losses are not to be used to measure going concern value, there is even less reason to use hypothetical losses for that purpose. Plainly the Secretary was not bound to make a separate allowance for going concern value upon the basis of Howson's testimony. There is no evidence in the record requiring a separate allowance and the Secretary was patently justified in not padding the rate base with an additional allowance, unless, as a matter of law, a separate allowance is required.

*The Decided Cases Clearly Establish That No Separate Additional Allowance For Going Concern Value is Required Per Se*

In *Cedar Rapids Gas Company* v. *Cedar Rapids*, 223 U. S. 655, this Court upheld an ordinance fixing gas rates in which no separate allowance had been made for going concern value, saying that the lower court "expressly took into account the fact that the plant was in successful operation."

In *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, the company sought to enjoin the enforcement of a municipal ordinance fixing gas rates. It was contended that the rates were confiscatory. The master appointed by the District Court, after finding the physical value of the property and allowing 15% for overheads, determined a value of $300,000 for the item of going concern. After consideration of the *Cedar Rapids* case he decided to disallow the item of $300,000 for going concern value. In sustaining the master's finding, this Court said (at p. 171):

> While there is a difference between court and counsel as to what the Master meant by this, we think it is apparent that he meant to say that, applying the rule of the *Cedar Rapids Case*, he had already valued the property in the estimate of what he called its physical value, upon the basis of a plant in actual and successful operation; for he said that otherwise its value would be much less.

> As pointed out in the *Cedar Rapids Case*, if return is to be regarded beyond that compensation which a public service corporation is entitled to earn upon the fair value of its property, the right to regulate is of no moment, and income to which the corporation is not entitled would become the basis of valuation in determining the rights of the public. When, as here, a long established and successful plant of this character is valued for rate-making purposes, and the value of the property fixed as the Master certifies upon the basis of a plant in successful operation, and overhead charges have been allowed for the items and in the sums already stated, it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves and the appellant's contention in this behalf is not sustained.

Among the overheads included in the physical value by the master in the *Des Moines* case were legal expenses, engineers' fees, compensation insurance, contingencies, costs of administration, and interest and taxes during construction. In referring to the cost of establishing the business the Court said (at p. 166):

> For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a

> Company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business.

In recent decisions this Court has applied the same principles. In *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, the company attempted to have rates fixed by the Commission set aside. The company claimed a separate allowance of $9,200,000 for going-concern value. Witnesses for the company had calculated that from $9,000,000 to $16,000,000 was necessary for that item. The Commission disallowed this claim, but in fixing a final value it gave consideration to the fact that the plant was a going concern. In affirming the decision of the lower court dismissing the bill, this Court said (at pp. 313–315):

> The concept of going value is not to be used to escape the just exercise of the regulatory power in fixing rates, and, on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones.
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> The principle as thus recognized and limited is obviously difficult of application. *Cedar Rapids Gas Co.* v. *Cedar Rapids, supra.* It does not give license to mere speculation; it calls for consideration of the history and circumstances of the particular enterprise, and attempts at precise definition have been avoided. It is necessary again, in this relation, to distinguish between the legislative and judicial functions. It is the appropriate task of the Commission to deter-

> mine the value of the property affected by the rates it fixes, as that of an integrated, operating enterprise, and it is the function of the Court in deciding whether rates are confiscatory not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use.

This Court then reviewed its prior decisions involving going concern value, and continued (at pp. 315–316):

> In the light of these decisions, our inquiry must be, *first,* as to the actual scope and effect of the legislative determination in relation to the value of the property as that of an integrated and established enterprise, and, *second,* whether the evidence requires the conclusion that by reason of the inadequacy of the valuation the result is confiscation. As to the first question, it is urged that the Commission declined to allow any amount for going value. It is true that the Commission, refusing to admit the assumptions underlying the Company's claim for the amount of $9,228,667 as going value, stated that it did allow "for the so-called intangible going concern value by treating its cost as a current operating expense." But we cannot fail to give effect to the fact that the Commission, determining its rate base at $65,500,000 for 1930, on the basis of fair value, stated that (apart from deduction for accrued de-

> preciation) this amount was "the fair value of the property here involved as a going property with business attached, giving full effect to the current level of prices and allowing for any intangible elements of value not fully cared for in the usual and current operating expense."

This Court then analyzed the valuation of the physical property and concluded that there was a substantial margin in the valuation, saying (at p. 317):

> The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element.

In *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 290, the company challenged rates prescribed by the Commission for natural gas. The company claimed a separate allowance of from $125,000 to $140,000 as a separate amount for going concern value. The Commission rejected the separate allowance and its action was upheld by the Supreme Court of Ohio, and, on appeal, by this Court, which said (p. 309):

> Going value is not something to be read into every balance sheet as a perfunctory addition. * * * Here the company was a small one and its organization simple. There was no diversified and complex business with ramifying subdivisions. We cannot in fairness say that after valuing the

> assets upon the basis of a plant in successful operation, there was left an element of going value to be added to the total. Even if the addition might have been made without departure from accepted principles, the omission to make it does not appear to have been so unreasonable or arbitrary as to overleap discretion and reach the zone of confiscation. * * * Much that the framers of a schedule are at liberty to do, this court in the exercise of its supervisory jurisdiction may not require them to do. For the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled.

The above decision was followed within a month by *Columbus Gas & Fuel Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 398, in which this Court said (at p. 411):

> Objection is made also as to the disallowance of a going value for the affiliated companies. Going value was excluded both by court and by Commission as an item of property to be separately appraised and separately reported. The record justifies a holding that it was reflected in the other items and particularly in the appraisal of the physical assets as part of an assembled whole. Cf. *Hardin-Wyandot Lighting Co.* v. *Public Utilities Comm'n.,* 118 Ohio St. 592, 603; 162 N. E. 262. This, we think, was adequate.

This Court then discussed the estimates of going concern value prepared by different experts in behalf of the appellant, concluding (at p. 413):

> We cannot find that the Commission and the court went beyond the bounds of a legitimate discretion in putting aside these estimates as too uncertain to be followed.

It is, therefore, well established by this Court that rate regulatory bodies are not required by mere speculative and theoretical evidence to make separate allowances in rate bases for going concern value. If property has been valued on the basis of a plant in successful operation, no separate allowance need be made as a matter of course over and above value reflected in the physical assets, unless the evidence clearly shows some peculiar reason requiring an additional allowance. As already demonstrated, the evidence in the present case does not show any reason requiring a separate allowance for going concern value here.

*The Secretary's Total Valuation Amply Allows for the Element of Going Concern Value*

The Secretary's valuation, however, amply allows for the element of going concern value, and refusal to make a separate allowance therefor on the basis of Howson's testimony does not mean that the Secretary valued the property as "bare bones." Indeed, the valuation adopted is the value of a plant in successful operation, a "living

organism", and it includes overheads sufficient to permit full restoration of the used and useful property. The record squarely refutes appellant's contention that the valuation adopted was a "bare bones" value.

The Secretary found that $1,537,953 was the reproduction cost less depreciation of appellant's used and useful structures (R. 104). To this amount he added $358,520 which was the depreciated value of the overheads (R. 105), resulting in a cost of reproduction new less depreciation of $1,896,473 including overheads. Additions and betterments brought this up to $2,039,616 (R. 106). These overheads include omissions and contingencies, general salaries, legal expenses, engineers' and architects' fees, fire and tornado insurance, workmen's compensation and public liability insurance, taxes during construction, and interest during construction including interest on land (R. 99–100). Similar items, when added to the cost of labor and materials, were considered in the *Des Moines* case by the master as giving recognition to the going concern element, and this Court thought them sufficient.

The allowance of these items is sufficient to permit reconstruction of the entire used and useful plant of appellant and to put it in readiness to render service. In determining its reproduction cost new less depreciation the Secretary envisioned an assembled plant, complete in every respect, as it

was at the time of the hearing. The testimony of Henrici, the Government's valuation engineer, is significant in this connection. He said (R. 439):

> I stated that I made no separate and distinct allowance in my appraisal for going concern value. It is possible that an article of property could have a cost which might be either greater or less than its value. Cost and value are not necessarily synonyms. In my appraisal I was technically seeking to obtain costs. My figures attempt to set up my opinion of the value of reproduction cost of property and the reproduction cost less depreciation. I do not attempt to set up market value for the property. Values are established by me on the basis of market value of the materials and labor, but that is not the market value of the property. It is the cost of reproducing and the cost of reproducing less depreciation. I valued the property as I found it, and, of course, the property is mostly used in connection with a going business. Assuming that the St. Joseph Stock Yards had ceased to do business, had no business in prospect, ceased to be a going concern, the pens, fences, paving, and matters of that kind would have little or no value, market value depending partially on income. If someone undertook to reproduce the St. Joseph Stock Yards in a desert where there were no railroads, no roads, no livestock, and no business, that would tend to increase the cost due to lack of labor supply.

It is clear that Henrici regarded his valuation as embodying the element of going concern value.

Quite apart, however, from the fact that the structural property was valued as part of a living organism and not as "bare bones", the very *method of ascertaining value for rate-making purposes* that was used in this proceeding tended to establish a liberal valuation sufficient to recognize and cover the going concern element, even if it had not been covered in the valuation of the specific structures. Thus, the fact is important that the Secretary's method was *reproduction cost* unmodified by considerations of actual or historical cost (R. 106, 113).

Most of appellant's structures were built more than thirty years ago at a time when labor and materials were much cheaper than now (R. 626). These structures for the most part will never have to be replaced *in toto* because they can be maintained in service condition by normal repairs and piecemeal replacements, for which adequate allowance has been separately made. Thus in ascertaining value the Secretary has adopted a method which allows a substantial increment over and above actual cost. He has taken reproduction cost less observed depreciation, as a measure of value, without undertaking to weigh in the balance other factors legally recognizable which would undoubtedly have tended to diminish the value found.

It cannot seriously be contended on the record in this case that the use of reproduction cost less

observed depreciation as a *sole* measure of value is not liberal *per se,* and that the exclusive use of this method does not in and of itself include a margin that is in fact large enough to embrace the going concern element.*

The financial history of the company also demonstrates that the use of reproduction cost as a measure of value is *per se* liberal. The record does not disclose the financial history of appellant prior to 1916, and it is not known to what extent the book

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* It would seem, moreover, that the fact that a property is a going concern is one of the principal reasons for using reproduction cost as a measure of value, and that use of reproduction cost may, in itself, largely cover the going concern element. If a property were not a going concern would cost of reproduction be a reasonable measure of value, or would not value have to be measured by some other method? It has been suggested that "it is the going concern element that transmutes cost of reproduction new into value" (R. 112). This was also indicated by appellant's witness Howson when he said (R. 860):

"As to what element or attribute of property converts cost of reproduction new into value, I believe that cost of reproduction new less accrued depreciation is the best index of value, in all cases where the property is serving a useful need to the community, has developed that service fully and is performing it so satisfactorily that it is better than that same service could be supplied by others and at a cost, and I think character of service which insures the continuity of it for the future. Under those conditions, I believe that the cost of reproduction new less accrued depreciation is the best indication of value."

Howson said that a property which is losing money "with no prospects of ever getting beyond that stage" would have a "negative" going concern value, and its physical property "would have a junk value, which would be less than its cost of reproduction." Such property, he thought, "would be worth less than the physical cost of reproduction" (R. 858).

value of the property of that date represented the actual cost. However, the record shows the financial history of appellant since 1916, and it reveals that in 1923 appellant set up on its books an item for "Appreciation of Assets" amounting to $1,362,485.84 (Gov. Ex. 121A, p. 7). This appreciation in assets was based upon an appraisal made by the American Appraisal Company in 1922. This fact further indicates that if the Secretary had given consideration to the element of original cost, such consideration would have had a tendency to produce a lower fair value than that actually found.

A further margin of liberality was shown in the finding of fair rate of return. In arriving at the maximum rates prescribed as reasonable the Secretary employed a seven percent rate of return as a rate factor. He might, however, have employed a rate of return as low as six and one-half percent and still have based his findings on substantial evidence. The economist who testified on rate of return was of the opinion that if the six year period from 1927 to 1932, inclusive, were considered, a reasonable rate of return would be between six and one-half percent and seven and one-half percent (R. 114). Later it will be shown that if the prescribed rates had been applied on the basis of the Secretary's findings during the six year period 1927 to 1932, inclusive, the average annual net operating income of appellant would have been considerably more than $50,000 in excess of that found by the Secretary to constitute a fair return. If

$50,000 is capitalized at seven percent it results in the equivalent of over $700,000 additional value.

It is submitted that the Secretary in his finding of fair value gave full consideration to the element of the going concern value of appellant's used and useful property, and that his refusal to add a separate allowance to the rate base for going concern value does not render his order confiscatory.

## II. The Maximum Rates Prescribed by the Order of the Secretary Are Sufficient to Yield a Fair Return on the Fair Value of Appellant's Used and Useful Property

### A. The amount allowed by the Secretary from gross revenues to cover repairs and a reserve for depreciation is more than sufficient for appellant's needs

(Appellant's Brief, Point XIV, p. 134)

The Secretary found that $80,000 was an adequate amount to be charged by appellant as a current annual operating charge both to cover repairs and to provide for a depreciation reserve (R. 117–119). This figure was made up by estimating that approximately $38,500 annually would be needed for repairs, leaving the balance to be covered into the depreciation reserve. Appellant objects to the allowance of only $80,000 on the ground that not less than $100,000 annually is required for depreciation reserve alone in addition to the amounts needed for current repairs

In *Clark's Ferry Bridge Co.* v. *Public Service Commission of Pennsylvania,* 291 U. S. 227, this Court has said (at p. 240):

> The question of the amount which should be allowed annually for depreciation is a question of fact. *Georgia Railway and Power Co.* v. *Railroad Commission*, 262 U. S. 625 at 633.

Again, speaking of annual charges to depreciation reserve in *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, this Court has said (at p. 158):

> It is evident that past experience is an indication of the Company's requirements for the future.

And in *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, this Court said (pp. 169–170):

> Confiscation being the issue, the Company has the burden of making a convincing showing that the amounts it has charged to operating expenses for depreciation have not been excessive. That burden is not sustained by proof that its general accounting systen has been correct. The calculations are mathematical but the predictions underlying them are essentially matters of opinion. They proceed from studies of the "behavior of large groups" of items. These studies are beset with a host of perplexing problems. Their determination involves the examination of many variable elements, and opportunities for excessive allowances, even under a correct system of accounting, are always present. The necessity of checking the results is not questioned. The predictions must meet the controlling test of experience.

That portion of the Secretary's order which deals with repairs and depreciation (R. 117–119)

indicates that it was based upon a study of the past experience of the company. In considering appellant's actual experience, the Secretary had before him the history of the repair account, the depreciation reserve account, the charges made for retirements over many years, and the surplus account.

While appellant maintained separate accounts for repairs on the one hand and depreciation reserve on the other, the record does not indicate that any definite line of demarcation was observed by appellant in making charges against the repair account as distinguished from the depreciation reserve account. For example, the roof of the hog yards was replaced at a cost of $4,445.93, and the roof of the sheep shed was replaced at a cost of $3,232.43 (Gov. Ex. 121A, pp. 254, 4). These costs were charged to current repairs on the books of the company, although it would seem that they should have been charged against the depreciation reserve in the light of the testimony of the accountants for both parties to the effect that renewals or replacements of property should be charged to the depreciation reserve account (R. 361–362, 446). At the first hearing, appellant's consulting accountant said that "it is possible that we might classify the item as a repair and yet it would have a considerable life period" (R. 362). A study of the company's annual expenditures for repairs and maintenance discloses that they include many replacements. It was this fact which led the Secretary to make one allowance to cover both mainte-

nance and depreciation reserve. Thus was eliminated the necessity of having to determine exactly whether each item constituted a repair or a replacement.

The Secretary's estimate of the amount annually needed for repairs and replacements was based first of all upon a study of the actual amounts expended over a long period of years by appellant and charged to the repair account. The figures are as follows:

| Year | Total | Year | Total |
|---|---|---|---|
| 1918 | $40,484.37 | 1927 | $39,000.48 |
| 1919 | 72,131.89 | 1928 | 45,679.60 |
| 1920 | 52,820.69 | 1929 | 43,516.51 |
| 1921 | 29,172.07 | 1930 | 29,500.12 |
| 1922 | 38,560.57 | 1931 | 24,905.34 |
| 1923 | 48,350.88 | 1932 | 19,793.79 |
| 1924 | 47,072.47 | | |
| 1925 | 42,391.99 | Total | 629,066.81 |
| 1926 | 55,686.04 | Yearly average | 41,937.78 |

The above table includes repairs on property found not to be used and useful for the period under consideration amounting to slightly over $50,000, or an average of approximately $4,700 per year. Subtract $4,700 from the yearly average shown in the table and the result is an annual expenditure of approximately $37,500 for repairs on used and useful property (Gov. Ex. 121A, pp. 338–342). There are also included in these repairs certain items of expense for replacements, such as replacement of the roof on the hog yards and the sheep shed previously discussed. So, based upon the actual experience of appellant, the sum of $38,-

500 (found by the Secretary to be approximately the average amount needed annually for repairs) is clearly sufficient.

Taking up retirements, the history of the depreciation reserve and of the surplus account shows the actual amount of loss which has been sustained because of retirements since 1915, although deductions for retirements shown on the books do not in all cases represent actual loss because they represent gross and not net retirements. Some of the properties retired were sold or traded for new and similar assets, so that the net retirements would not be as great as is indicated. The history of the depreciation reserve account is summarized as follows:

| Year | Provided by expense allowance | Provided by surplus adjustment | Total provided | Deductions for retirements | Accumulated balance |
|---|---|---|---|---|---|
| 1915 | $40,067.44 | | $40,067.44 | [1] $10,354.26 | $29,713.18 |
| 1916 | 42,825.88 | | 42,825.88 | | 72,539.06 |
| 1917 | 39,276.65 | | 39,276.65 | | 111,815.71 |
| 1918 | 46,902.18 | | 46,902.18 | | 158,717.89 |
| 1919 | 56,335.10 | | 56,335.10 | 504.79 | 214,548.20 |
| 1920 | 58,965.74 | | 58,965.74 | | 273,513.94 |
| 1921 | 59,161.24 | | 59,161.24 | 2,072.50 | 330,602.68 |
| 1922 | 59,345.07 | $231,223.52 | 290,568.59 | | 621,171.27 |
| 1923 | 120,418.78 | | 120,418.78 | | 741,590.05 |
| 1924 | 124,242.01 | | 124,242.01 | 735.41 | 865,096.65 |
| 1925 | 127,487.71 | | 127,487.71 | 2,213.67 | 990,370.69 |
| 1926 | 128,066.38 | | 128,066.38 | 3,104.87 | 1,115,332.20 |
| 1927 | 127,829.16 | | 127,829.16 | 11,794.11 | 1,231,367.25 |
| 1928 | 127,914.24 | | 127,914.24 | 24,288.04 | 1,334,893.45 |
| 1929 | 130,185.00 | | 130,185.00 | 37,511.02 | 1,427,567.43 |
| 1930 | 121,647.36 | | 121,647.36 | 15,274.18 | 1,533,940.61 |
| 1931 | 123,066.12 | | 123,066.12 | 1,863.13 | 1,655,143.60 |
| 1932 | 122,509.92 | | 122,509.92 | 6,589.88 | 1,771,063.64 |
| | 1,656,245.98 | 231,223.52 | 1,887,469.50 | 116,405.86 | |
| Dec. 31, 1932, balance | | | | | [2] 1,771,063.64 |

[1] Equipment 1916–22 retired.

[2] Table compiled from Government exhibit 124, p. 15, except September, October, November, and December 1932, taken from Government exhibits 121–B and C.

The net accumulated balance in the depreciation reserve account of $1,771,063 or approximately 65% of the total constitutional fair value of the property results from the fact that charges of only $116,405.86 were made against that account during the 18-year period, whereas appellant credited to that account $1,887,469.50, leaving a net accumulated balance of $1,771,063.64. Appellant began to set up and accumulate a depreciation allowance in 1915 on a plant which had been constructed in the late 1890's. As far as could be ascertained, no provision was made for depreciation reserve prior to 1915.* The above table shows that from 1915 to 1922 the allowance set aside for the depreciation reserve annually ranged from approximately $40,000 to approximately $60,000. As the result of an appraisal made by the American Appraisal Company in 1922, however, there was set up on the books of the company a reproduction new value on which depreciation was estimated by the engineers to be $621,171.27 (Gov. Ex. 121A, p. 382). Apparently, in order to build up the depreciation reserve to offset this estimated accrued depreciation, a transfer of $231,223.52 was

*Therefore, appellant's argument that certain "items of property which had *actualy reached the end of their service lives and been retired*" had an inadequate amount provided against them in the depreciation reserve (Br. p. 154) is without merit because appellant had set up no depreciation reserve prior to 1915, even though the assets were rendering service prior to that date.

made from the surplus account to the depreciation reserve account. Thereafter appellant increased the amount set aside annually for depreciation reserve. Since 1922 the amount set aside has ranged from approximately $120,000 to approximately $130,000 each year. The result was, as already noted, there had accumulated by 1932 a depreciation reserve of $1,771,063.64, although since 1915 there had been deducted for retirements only $116,405.86.

*The Actual Depreciation Observed by All the Engineers Discloses the Exorbitance of the Amount Appellant Has Carried into Depreciation Reserve*

While it is not expected that the accrued balance in the depreciation reserve account will be exactly offset by the amount of accrued depreciation in the property, it may be expected that the two amounts will bear some reasonable relation to each other. In *Clark's Ferry Bridge Co.* v. *Public Service Commission of Pennsylvania,* 291 U. S. 227, this Court commented on the disparity between the Company's estimate of accrued depreciation and the annual allowance asked for a depreciation reserve.

In this case an equally significant disparity exists between appellant's estimate of accrued depreciation and the allowance asked for a depreciation reserve. There was an appraisal of appellant's property made by the American Appraisal Com-

pany which was set up on appellant's books as of December 31, 1922. Three appraisals were later made by the Government engineer, one in 1927, another in 1929, and a third in 1932. Two appraisals were also made by appellant's engineer, one in 1929, and a second in 1932. The following table gives a comparison of the reproduction new values of appellant's depreciable property and depreciation estimated by the engineers, the condition percent of the depreciable property as reflected by the different appraisals, and the value and depreciation carried on appellant's books on several different dates (showing the condition percent that would be indicated if the depreciation carried on the books were to be regarded as a criterion of actual depreciation):

| | | Total value | Depreciation | Condition |
|---|---|---|---|---|
| May 31, 1916 | Books, value of land, buildings, and improvements, combined. (Gov. Ex. 121-A, p. 384) | $4,261,405.05 | None | *Percent* 100 |
| Dec. 31, 1922 | Books and American Appraisal Company (Gov. Ex. 121-A, p. 382) | 2,695,756.66 | $621,171.27 | 76.96 |
| Jan. 1, 1927 | Books (Gov. Ex. 121-A) | 2,738,288.98 | 1,085,332.20 | 60.37 |
| 1927 | Henrici appraisal (R. 429) | 3,199,764.00 | 757,135.00 | 76.34 |
| Dec. 31, 1929 | Books (Gov. Ex. 121-A) | 2,717,587.11 | 1,427,667.43 | 47.47 |
| June 30, 1929 | Henrici (R. 429) | 3,010,835.00 | 641,464.00 | 78.7 |
| Do | Kosters (R. 452) | 3,441,902.00 | 535,907.00 | 84.43 |
| Aug. 1, 1932 | Books (Gov. Ex. 121-B) | 2,776,595.92 | 1,744,908.92 | 37.16 |
| Do | Henrici (Gov. Ex. 114) | 2,811,037.00 | 648,631.00 | 76.93 |
| Do | Kosters Stone & Webster (Resp. Ex. 111) | 3,066,672.00 | 337,437.00 | 89.00 |

From this table it will be observed that if the amount of depreciation carried on the books were to be taken as a criterion of actual depreciation the percent condition of the property would have been

37.16 in 1932, although the government engineer found it to be 76.93, and appellant's engineer found it to be 89. Appellant's books would indicate depreciation of 62.84 percent, whereas the appellant's engineer found the property had depreciated only 11 percent. The estimates of the government engineer as to the accrued depreciation and percent condition of the property in 1927, 1929, and 1932 do not vary materially. His finding in that respect bears out the testimony of those witnesses who testified that appellant's property is being maintained at a fairly stable condition, through a sound policy of repairs and maintenance. As the amount of depreciation carried on the books increased, the gap between the percent condition indicated by the books and that indicated by the engineers widened. It is even noteworthy that appellant's engineer, Kosters, found less accrued depreciation and a higher percent condition in 1932 than he had found in 1929.

It is recognized that the judgment factor enters into the estimates which were made by the engineers as to the percent condition of appellant's property. It does not seem, however, that the engineers who examined the property during the 10-year period could have been in error all the time to the extent of more than a million dollars. Their estimates of accrued depreciation did not vary at any time by more than $100,000 until 1932, when that observed by appellant's engineers was less by some $300,000 than that observed by the Gov-

ernment's engineer. If appellant's engineer is correct, the reserve for depreciation would seem to be excessive by approximately $1,400,000. If the Government's engineer is correct, the reserve would seem to be excessive by approximately $1,000,000.

*Appellant's Experience Demonstrates the Adequacy of the Secretary's Allowance*

The facts with respect to the depreciation reserve allowance and requirements relating to the structural property in the pen areas shed further light on this comparison. The property in the pen areas is kept in proper operating condition by ordinary repairs and piecemeal replacements. The reproduction new cost of this part of the property is about one-half of the reproduction cost of the entire property—or approximately $1,500,000. During the period from 1916 to 1932 there was retired from this part of the property for all causes property of the value of about $40,000 (R. 458). The amount set up on the books during this period for depreciation on this portion of the property was about $600,000 (R. 456). The gross value of the retirements for all property, including that not used and useful for the years 1916 to 1932, was $239,550.80 (R. 453). This amount includes retirements for fire losses which were covered by insurance (R. 453). The annual average of retirements for the 17-year period under consideration is slightly over $14,000. This amount does not indicate the actual loss to appellant through retire-

ments because it represents gross retirements. If net losses are the proper measure of needs, then the charges for retirements would be considerably reduced because of offsetting gains from the sale of retired property, property received in trade, etc. If net retirements are to be considered, then during this period we find that there was charged to the depreciation reserve only $116,405.86, *supra,* p. 98. During the same period there was charged to surplus for retirements $54,896.85 (Gov. Ex. 124, p. 18; 121 C, p. 2). Thus, the total net charge to reserve and surplus over this period was $171,302.71, or an annual average of approximately $10,000 for the period from 1915 to 1932. Bearing in mind that appellant's physical property had been in existence approximately twenty years before the time for which depreciation information is now available, it appears that the experience of these eighteen years as to repairs, maintenance, and depreciation affords a reliable guide as to future requirements, and from the foregoing it will be observed that appellant's experience indicates that approximately $47,000 annually has been sufficient to take care of repairs, maintenance, and retirements during the period for which the financial history of appellant is available ($37,000 for repairs and $10,000 for retirements).

The Secretary found that $50,000 would be a sufficient amount to include in annual expenses to cover repairs and provision for depreciation reserve "were it not that the periods of experience

above described have not been sufficient in length to provide adequate tests as to certain structures which by reason of their nature may be expected to last considerably longer than the property in composite; and also were it not that there is deterioration through obsolescence and changed conditions which reasonably is to be expected to occur but which reasonably is unobservable" (R. 118).

The Exchange Building may be taken as an example of such a structure. The life of this building was estimated by the Government engineer at forty years (Gov. Ex. 124, p. 12). It has been in existence since about 1898 (R. 456). No substantial charges against the depreciation reserve have been made on account of this building. On the other hand, a considerable part of the pen area which has been given a life-estimate by the Government engineer of from 15 to 20 years has been replaced during this period, the cost of which has chiefly been reflected in the repair account rather than in the depreciation reserve account. The reproduction cost new of those structures having a life ranging from 35 to 50 years is approximately $1,300,000 (Gov. Ex. 124, pp. 12–14). The Secretary's allowance of $80,000 annually to cover repairs and depreciation is approximately $33,000 in excess of the amount ($47,000) shown to have been required on the basis of appellant's experience. The allowance made by the Secretary is, therefore, more than sufficient to take care

of any charges that may have to be made on account of the retirement or replacement of these long-lived structures.

An allowance to be carried into the depreciation reserve greater than the $80,000 found by the Secretary to be reasonable on account of repairs and depreciation would make it possible for the appellant to pursue a liberal dividend policy at the expense of the ratepayers.*

* On pages 10, 11, and 381 of Exhibit 121A there are reflected significant facts in regard to appellant's financial history and dividend policy. The following table shows from the years 1916 to 1932, inclusive, the amount of capital stock outstanding, the annual dividends, and the percentage of dividends to capital stock:

| | Capital stock | Total dividends | Percentage dividends to capital stock (percent) |
|---|---|---|---|
| June 1, 1916 to Dec. 31: | | | |
| 1916 | $2,500,000 | $ 150,000 | 6 |
| 1917 | 2,500,000 | 150,000 | 6 |
| 1918 | 2,500,000 | 187,500 | 7½ |
| 1919 | 2,500,000 | 200,000 | 8 |
| 1920 | 2,500,000 | 400,000 | 16 |
| 1921 | 2,500,000 | 200,000 | 8 |
| 1922 | 2,500,000 | 325,000 | 13 |
| 1923 | 2,500,000 | [1] 1,300,000 | 47 |
| 1923 | 3,750,000 | 168,750 | |
| 1924 | 3,750,000 | 225,000 | 6 |
| 1925 | 3,750,000 | 375,000 | 10 |
| 1926 | 3,750,000 | 225,000 | 6 |
| 1927 | 3,750,000 | 412,500 | 11 |
| 1928 | 3,750,000 | 487,500 | 13 |
| 1929 | 3,750,000 | 412,500 | 11 |
| 1930 | 3,750,000 | 487,500 | 54.67 |
| 1930 | 1,875,000 | [2] 1,050,000 | |
| 1931 | 1,875,000 | 225,000 | 12 |
| 1932 | 1,875,000 | 187,500 | 10 |
| Total | 55,625,000 | 7,168,750 | |
| Average for 1 year | 2,927,631 | 421,691 | |

[1] Stock dividend.

[2] Liquidating dividend, some of which was provided from the sale of assets.

A stock dividend was paid in 1923. In 1930 a liquidating dividend was paid, some of which was paid from the sale of certain assets.*

On the basis of the foregoing, it is submitted that the Secretary's finding with respect to a reasonable allowance to cover operating expense on account of repairs and depreciation reserve is amply supported by the evidence.

### *The Cases Support the Government's Position On Depreciation Reserve*

The law requires a realistic and practical approach to this problem and does not confine the regulatory authority only to theoretical considerations. When the experience of the utility whose

*A cursory observation of the table in the footnote on p. 106, *supra*, will show that the average percentage of dividends paid on capital stock between the years 1916 and 1923 was in excess of 9%. In the year 1923 a 50% stock dividend was declared, thus increasing the outstanding capital stock to $3,750,000. Assuming that the original stock was paid in full in cash in the amount of $2,500,000, it will be seen that this stock dividend resulted in increasing the capital stock without any additional contribution from the stockholders. Nevertheless, the appellant after 1923 was able to pay handsome dividends on its total capital stock, including the stock for which no cash was contributed by the stockholders. From 1924 to 1929, inclusive, the appellant was able to maintain an average dividend of 9½% on its total outstanding capital stock.

In addition to this large return, the appellant was, in 1930, able to pay a 50% liquidating dividend. It is recognized that a liquidating dividend does not always mean that the

rates are under investigation is available to the rate-making authority that actual experience should be the guide.*

In *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151, the annual allowance for depreciation was one of the principal points in issue. In that case the state commission had concluded that the depreciation reserve, amounting at the end of 1922 for the Chicago property to about $26,000,000, had been built up by annual additions which were in excess of the amounts required. In

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company is successful because of the fact that the assets are merely being paid to the owners of the property, or the stockholders. But in this case it should be observed that the liquidating dividend returned in cash to the stockholders an amount equal to the face value of the stock created by the stock dividend in the year 1923, and $625,000 additional. Despite this huge outlay of cash on the part of the appellant, it was able to pay a dividend of 12% in 1931 and a dividend of 10% in 1932. These dividends are hardly representative of a company which is barely able to exist under its present income. Nor is a dividend of 10% in 1932 indicative of a company which is losing money.

It will be seen that the appellant has been able to return to the stockholders in cash more than 75% of their original cash investment in capital stock. In other words, the stockholders who originally paid $2,500,000 for their capital stock have been repaid $1,875,000, but they still own all of the equity in the property.

* The Secretary used the test of experience in the Denver Union Stockyards rate proceeding. In passing upon his findings, the District Court said in *Denver Union Stockyards Company* v. *United States*, 57 F. (2d) 735 (at p. 745):

"In addition to the evidence of the engineers, the Secretary had before him the fact that the cost of retirements and replacements of property during the preceding nine years

subsequent years up to and including 1931 this reserve had been increased to $48,362,000. In considering the necessity for such a large depreciation reserve, this Court considered, in connection therewith, the accrued depreciation as asserted by the Company. Thus this Court said (at pp. 170–171):

> In this instance, the evidence of expert computations of the amounts required for annual allowances does not stand alone. In striking contrast is the proof of the actual condition of the plant as maintained—proof which the Company strongly emphasizes as complete and indisputable in its sharp criticism of the amount of accrued depreciation found by the District Court in valuing

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had averaged $4,371 annually. True, the amount of property that is replaced in one or two years has no bearing on its probable life; but, where the property is of varying ages and nature, an experience of nine years may have some evidentiary value. The Secretary had evidence that much of the property was susceptible of maintenance by minor repairs which were properly charged to expense rather than to capital. It appeared that the petitioner had, for a period of twelve years, set up on its books an average depreciation of about $45,000 a year. The Secretary made an allowance for an annual depreciation charge of $47,000 a year. Considering the fact that the Secretary found that this property, after a great many years of useful life, is still in 83.8 percent condition, and considering the small amounts which had been actually expended thereon for replacements during the past nine years, we are of the opinion that the Secretary's allowance is supported by the evidence."

See also *Union Stockyards Company of Omaha* v. *United States*, 9 F. Supp. 864, 882–883.

the property. The Company insists that "the existing depreciation in the property, physical and functional, does not exceed 9 percent in the years 1923 to 1928 and 8 percent thereafter." The existing depreciation as thus asserted by the Company, and the amounts it shows as the depreciation reserve allocated to the intrastate business in Chicago, (taking in each case the average amounts per year) are as follows:

| Years | Existing Depreciation | Depreciation Reserve | Years | Existing Depreciation | Depreciation Reserve |
|---|---|---|---|---|---|
| 1923 | $11,992,000 | $26,797,000 | 1928 | $16,241,000 | $42,769,000 |
| 1924 | 12,865,000 | 29,316,000 | 1929 | 15,300,000 | 44,515,000 |
| 1925 | 13,775,000 | 32,155,000 | 1930 | 15,863,000 | 45,829,000 |
| 1926 | 14,621,000 | 35,572,000 | 1931 | 15,828,000 | 48,362,000 |
| 1927 | 15,360,000 | 39,352,000 | | | |

In explanation of this large difference, the Company urges that the depreciation reserve in a given year does not purport to measure the actual depreciation at that time; that there is no regularity in the development of depreciation; that it does not proceed in accordance with any fixed rule; that as to a very large part of the property there is no way of predicting the extent to which there will be impairment in a particular year. Many different causes operating differently at different times with respect to different sorts of property produce the ultimate loss against which protection is sought. As the accruals to the depreciation reserve are the result of calculations which are de-

signed evenly to distribute the loss over estimated service life, the accounting reserve will ordinarily be in excess of the actual depreciation. Further, there are the special conditions of a growing plant,—"there are new plant groups in operation on which depreciation is accruing but which are not yet represented, or are but slightly represented, in the retirement losses." Where, as in this instance, there has been a rapid growth, retirements at one point of time will relate for the most part to the smaller preceding plant, while the depreciation reserve account is currently building up to meet the "increased eventual retirement liability" of the enlarged plant.

*Giving full weight to these considerations, we are not persuaded that they are adequate to explain the great disparity which the evidence reveals.* [Italics supplied.]

This Court then summarized the Company's contentions that the property was virtually in one-hundred percent service condition and that the plant was not functionally deficient in any practical sense. The Company claimed that the weighted average of its percent condition for six years was 91, and that for the years since 1928, the percent condition was 92. This Court concluded that this nearly constant level of percent condition over a period of years necessarily directed attention to the Company's policy in regard to current

maintenance. It was observed that the nine-year charges of the Company to current maintenance and depreciation were as follows:

| | Current maintenance | Depreciation | Total |
|---|---|---|---|
| 1923 | $5,643,623 | $4,222,000 | $9,865,623 |
| 1924 | 6,043,737 | 4,470,000 | 10,513,737 |
| 1925 | 6,563,193 | 5,048,000 | 11,611,193 |
| 1926 | 7,714,364 | 5,757,000 | 13,481,364 |
| 1927 | 8,849,550 | 6,335,000 | 15,184,550 |
| 1928 | 9,941,143 | 7,009,000 | 16,950,143 |
| 1929 | 10,671,576 | 7,436,000 | 18,107,576 |
| 1930 | 11,372,858 | 7,865,000 | 19,237,858 |
| 1931 | 10,842,053 | 8,133,000 | 18,975,053 |

This Court concluded (at pp. 174–175):

> In the light of the evidence as to the expenditures for current maintenance and the proved condition of the property—in the face of the disparity between the actual extent of depreciation, as ascertained according to the comprehensive standards used by the Company's witnesses, and the amount of the depreciation reserve—it cannot be said that the Company has established that the reserve merely represents the consumption of capital in the service rendered. Rather it appears that the depreciation reserve to a large extent represents provision for capital additions, over and above the amount required to cover capital consumption. This excess in the balance of the reserve account has been built up by excessive annual allowances for depreciation charged to operating expenses.
>
> * * * * *

> We find this point to be a critical one. The questionable amounts annually charged to operating expenses for depreciation are large enough to destroy any basis for holding that it has been convincingly shown that the reduction in income through the rates in suit would produce confiscation.

In *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California*, 289 U. S. 287, this Court (at p. 320), in upholding a commission's allowance for annual depreciation, supported its conclusions by reference to the utility's dividend record and the increase in its surplus.

It is submitted that the reasoning of this Court in the *Lindheimer* case and in the *Los Angeles Gas & Electric Corp.* case with respect to the treatment of depreciation reserve is fully applicable to the present case.

Appellant, in addition to making several miscellaneous objections to the allowance for repairs and depreciation which will later be discussed, contends (1) that its property has not existed a sufficient length of time to cause it to reach a period of normal deterioration and that therefore the test of average actual experience in determining annual requirements for repairs and depreciation is not applicable (Br. 155), and (2) that the Secretary has prescribed the sinking-fund compound interest method of ascertaining an allowance for deprecia-

tion reserve and that such method is improper in this case and has been improperly applied (Br. pp. 145–155). There is no merit in either contention.

(1) *Appellant's structural property has reached a period of normal deterioration.*—Although estimates may be made of the composite life of the physical operating property of a plant as a whole, actually a plant in operation never deteriorates to zero because it must constantly be kept, through repairs and replacements of worn out parts, in a condition to render service. This often leads, in the case of well-managed companies, after a number of years of operation, to a state of depreciation that remains about constant. Repairs, and the gradual replacement of parts as they wear out, maintain the property in good service condition. The expense of such maintenance after structural property has passed a certain age, becomes fairly static over a period of years, and necessities for the future can fairly be judged by the expense of the past.

On the other hand, before a property has reached this stage it is necessary to set aside in each year a larger amount in anticipation of future deterioration than the actual deterioration of the property calls for in order that the ultimate burden of replacement may be evenly spread over the life of the property. The record in the instant case clearly demonstrates that appellant's property has reached a normal operating condition—a condition in which

the expense required for repairs and replacements has for some years been, and may in the future be expected to be, fairly static.

Appellant's structural property consists mainly of three classes: (1) brick buildings, such as the Exchange Building; (2) pens, fences, and paving which compose the general pen areas of the stockyards, and (3) underground structures, such as sewers and water pipes (Gov. Ex. 114). The stockyard was built sometime during the 1890's, and has been rendering continuous service since that time (R. 626). A consulting accountant who was called as a witness by appellant in the first hearing testified that—

> In a property of that kind, we find that it shakes down after a period of years to a point of normal condition * * * perhaps at 75 percent condition * * * and that without fluctuating greatly the actual value of the property will drop a little and be restored; * * * but it is hardly fair, in a picture of that kind, to try to compare the situation with a single asset, the value of which is diminished until it reaches the point of zero. * * * You will find property which is nearly 100 percent, a property which is new, but, generally speaking, taking representative plants by and large, probably the figure of 75 percent condition after several years' operation would be rep-

> resentative (R. 354–355). * * * Generally speaking, it is to be expected that after the company has been operating for a period of time it reaches a certain basis of efficiency of operation, and its condition percent from then on remains normal. That is for the reason that current replacements ordinarily take care of current depreciation, and are more or less regular in their occurrence. I have never made any study to determine how long a stockyard would operate in order to reach that basis, but I would say that this particular stockyards has undoubtedly reached such a point. It is my understanding that it has been in operation since 1898 (R. 357).

A consulting engineer who testified for appellant at the second hearing said that appellant's property had "about reached the turn-over stage" and that this applied to the "stockyards' buildings, and improvements, which include the pen areas" (R. 723). He said that "the turn-over stage" is the phrase that:

> I have used a number of times and I have heard it used by other experts testifying on the subject of depreciation, it being the stage of renewals of the property of a composite nature where the renewals may be determined to be practically normal or uniform, and that would be true of pen areas where the service life was assumed for pens them-

selves as rather low and the age of the property was such that a great deal of it had already been renewed, so that we get to the point where renewals of renewals finally goes on to infinity and it reaches a uniform stage as a whole (R. 723).

(2) *The Secretary did not use the compound interest sinking-fund method of ascertaining an allowance for a depreciation reserve, and appellant's arguments directed at such methods are irrelevant.* Appellant asserts that this Court has never authorized or required the imposition of a compound interest sinking-fund basis for an annual depreciation reserve, and that "it must be apparent that the Secretary has here prescribed the sinking-fund compound interest method" (Br. p. 146). In making this argument appellant is laboring under a misapprehension of fact, because the Secretary obviously did not base the allowance for repairs and depreciation upon the compound interest sinking-fund method, as reference to the findings plainly shows (R. 117–119). Appellant's argument that the compound interest sinking-fund method should go only with an undepreciated rate base (Br. p. 147) is, therefore, also inapplicable to the present case. Appellant's argument with reference to the straight line method of computing depreciation implies that the Secretary should have relied solely upon this theoretical method advanced by appellant in spite of what the facts in this case reveal with respect to appellant's financial history and expe-

rience. But as already noted, it was proper for the Secretary to take into account the empirical factors which he did. *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151.

Appellant's contention that the Secretary used the sinking-fund compound interest method is predicated upon a misconstruction of the testimony of Government witness Bachmann. Appellant infers that Bachmann recommended an allowance of $50,000 per year for depreciation reserve based upon the sinking-fund compound interest method (Br. p. 146). The fact is, however, that Bachmann did not recommend the use of a sinking-fund compound interest method. What Bachmann in fact said was (R. 456–457):

> The straight line method, in my opinion, being out of the question for this particular purpose, there appears to be left only the sinking-fund method *or the method of actual retirements plus the actual accrual of depreciation as determined by observation.*

Bachmann then proceeded to discuss the amount which would have to be allowed if the sinking-fund compound interest method were adopted, concluding that the result under this method, based upon Henrici's estimate of service life, would be $50,000 per year. Bachmann, however, said (R. 457–458):

> The allowance which should be made by the Secretary, in my opinion, should be somewhere between the amount determined

on a retirement basis, about $10,000 being the minimum and a sinking-fund basis, $50,000 being the maximum.

Even if the Government witness had recommended the use of the sinking-fund compound interest method, that would not indicate that the Secretary was bound to adopt that method. There can be no doubt, however, on the record in this case that Government witness Bachmann did not recommend the use of the sinking-fund compound interest method.

Appellant contends that the straight-line method should have been used (Br. 147–149), but the testimony amply supports the Secretary's view that such method is inappropriate in view of appellant's experience (R. 454–456), and moreover this conclusion is supported by the *Lindheimer* case.

(3) *Miscellaneous objections raised by appellant.*—Appellant contends that under the Secretary's allowance for depreciation reserve sixty-three years would be required to accumulate a reserve equal to the cost of reproduction new, or more than twice the probable average life of the property as estimated by the engineers (Br. p. 139). But life tables must be qualified in the light of actual experience (R. 454). Indeed, the experience of appellant with respect to actual retirements made during the years 1916–1932 shows that such retirements aggregated $239,550 (R. 452). If retirements in the future were to be made at the same rate which pre-

vailed through this seventeen-year period, it would take approximately twelve similar periods to retire the structural property as a whole, or more than two-hundred years.

Appellant further contends that the Secretary may not require appellant to invest money for the purpose of earning a return to provide an adequate depreciation reserve, and that practical difficulties preclude the investment of such a reserve in interest-bearing securities (Br. p. 152). But this argument likewise is based upon a misapprehension of what the Secretary has done, because the findings clearly are not predicated upon anticipated earnings from investment of the reserve (R. 117–119). Any accumulations from investment of the depreciation reserve funds would simply increase the amount thereof over and above what the Secretary has found to be required for appellant's needs.

It is submitted that the Secretary's determination with respect to a reasonable allowance to be covered into rates for repairs and depreciation is reasonable, and is amply supported by the evidence.

B. THE MAXIMUM RATES AND CHARGES PRESCRIBED BY THE SECRETARY ON LIVESTOCK RESOLD OR REWEIGHED FOR PURPOSE OF SALE ARE BASED UPON CORRECT ESTIMATES OF THE VOLUME OF LIVESTOCK SUBJECT TO SUCH RATES AND CHARGES, AND THE RESULTING ESTIMATE OF THE YIELD FROM SUCH RATES AND CHARGES IS NOT EXCESSIVE

(Appellant's Brief, Point IX, p. 84)

The tariff of rates and charges collected by appellant prior to the Secretary's order included a provision for a yardage charge on livestock *resold in*

*the commission division* equal to one-half the yardage charges collected on livestock arriving by rail (R. 34–35, 397).

These rates were as follows:

| | Cents |
|---|---|
| Cattle | 17½ |
| Calves | 12½ |
| Hogs | 6 |
| Sheep and goats | 4 |
| Horses and mules | 17½ |

The Secretary found that while by the terms of the tariff the collection of the resale yardage charge was limited to resales made *in the commission division,* in actual practice appellant imposed the resale charge on other resales not made in the commission division "if they do not involve livestock 'to go to the country' that is, purchased by farmers to be fed" (R. 35).

Actually the practice of appellant with respect to collecting a resale charge upon livestock resold or reweighed for purpose of sale outside the commission division lacked uniformity. Although the President and General Manager testified that such a charge was imposed on resales taking place outside the commission division (R. 826), it appears from appellant's books that this charge was not always imposed (R. 569).

The Secretary reached the conclusion that to impose a resale charge on resales made in the commission division and not to impose such a charge on resales made in the traders' division or elsewhere in the yard was unreasonable and consti-

tuted unjust discrimination (R. 128). The physical characteristics of the traders' division are substantially the same as those of the commission division and the services rendered by appellant with respect to the livestock warehoused in each division do not differ materially (R. 36). If in addition to the ordinary yardage charge an added resale charge is imposed in one division there is no reason for failing to impose it in the other. In addition to the commission men who customarily take livestock on consignment for sale on a commission basis and who operate in the commission division, there is a class of persons doing business in the stockyards known to the trade as "traders" or "speculators" (and technically classified under the Act as "dealers") whose business principally consists of buying and selling on the stockyards. These traders operate in the so-called traders' division and constantly use the facilities of the stockyards, as do the commission men (R. 35–36). If no resale charge is imposed upon resales made in the traders' division, these traders are not subject to any yardage charge for their use of the facilities of the stockyards.

It is the duty of the Secretary under the Act to prescribe rates and charges which do not burden one class of persons who use the stockyard facilities for the benefit of other persons; the traders no less than other users of the facilities should pay for the services they receive. They occupy a consider-

able portion of appellant's facilities which they use as a place of business (R. 39–41). Unless a yardage charge is collected from these traders the only revenue which appellant receives from them is on such feed as it sells to them. If traders are allowed to use appellant's facilities without payment of the yardage charge, the inevitable effect is that the other patrons of the market necessarily pay in rates and charges an excessive amount in order to permit the appellant to carry the facilities used by the traders. The Secretary's order extending the resale yardage charge to the traders' division, as well as the commission division, is predicated upon the view that a reasonable charge should be imposed upon traders for the services and facilities which they enjoy.

The maximum resale yardage charge which the Secretary's order prescribed for resales in both the traders' and commission divisions followed the same schedule of rates as that previously in effect for the commission division with one minor exception. For cattle, hogs, sheep and goats, horses and mules, the Secretary prescribed the existing rates, namely, 17½¢, 6¢, 4¢, and 17½¢, respectively. The rate for calves which in appellant's existing tariff stood at 12½¢ was reduced by the Secretary to 11¢. The reason for this reduction was that, as above indicated, appellant's existing resale charge was fixed by taking half of the regular yardage charge for each species of livestock arriving by rail.

As shown elsewhere in this brief, *infra,* p. 151, the Secretary found that the most important volume of livestock now handled at the yards arrives by truck and, accordingly, he fixed the resale charge at one-half of the yardage charge on livestock arriving by truck. The yardage charge fixed by the Secretary in his order for calves arriving by truck is 22¢ and one-half of this is 11¢, the amount fixed by the Secretary as the resale charge for calves. It is to be noted that the resales of calves are inconsequential, amounting to not more than approximately 5,000 head in any one year.

Appellant, although apparently not relying greatly upon the proposition, suggests that there may be no lawful authority in the Secretary to impose the resale yardage charge on traders, citing *Denver Union Stockyards Company* v. *United States,* 57 F. (2d) 735 (Br. p. 92). The same question was also involved in *Union Stockyards Company of Omaha* v. *United States,* 9 F. Supp. 864, in which a three-judge district court in Nebraska expressly held that a yardage charge on traders equal to one-half the regular charge exacted from persons purchasing livestock for removal from the stockyards was lawful, notwithstanding a previous practice at the Omaha stockyards of giving traders yardage service free on that livestock resold to go to the country. The court in the *Omaha* case discussed the *Denver* case cited by appellant, and in effect seemed to hold that on this point the *Denver*

case was contrary to the holding of this Court in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

In the *Tagg Bros. & Moorhead* case, the petitioners contended that they could not collect permitted increases in commission rates to be charged to traders, or speculators, but the District Court overruled this contention and upheld the power of the Secretary in prescribing rates to take into account increased revenue from such an anticipated charge.* This Court, on appeal, although it did not discuss the particular point, affirmed the decree of the District Court upholding the order of the Secretary (280 U. S. 420).

The principal attack made by appellant upon the Secretary's findings with respect to a resale

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* In discussing this point the District Court said (29 F. (2d) 750, 756):

"The plaintiffs also claim that the audits of the business of the plaintiff, *Tagg Bros. & Moorhead*, and the business of R. M. Laverty, show that those concerns would lose money under the Secretary's rates. As to Tagg Bros. & Moorhead, they would, if the condemned excesses in expenses be continued, *and the increased rates allowed by the Secretary be disregarded.* These increased rates apply only to speculators. It appears that the practice has become established for the plaintiffs to charge a certain class of persons, called speculators or yard traders, half the regular commission which shippers generally have to pay for the same service. The Secretary evidently thinks this discrimination improper, and in his schedule he eliminates it, and authorizes the plaintiffs to charge ~~such~~ traders and speculators the same rate that apply to all others. Both the commission men and the speculators are certain that the whole business of buying for resale on the market will quit, to the detriment of the live-

charge is that the evidence does not support them, particularly in that the Secretary's estimates as to the amount of livestock which would be subject to this charge are excessive and that, therefore, his estimates as to the amount of revenue which will be derived from such charge are excessive. The facts, however, are very simple and easily understood. The Secretary did not undertake to make a prediction as to the exact number of head of livestock which would be received or handled by appellant in the future, but in the light of all of the information in the record he took as a factor in prescribing maximum rates a volume of receipts which appeared to be reasonable. In the case of resales and reweighs his volume factor for each species per year was as follows (R. 126):

| | |
|---|---|
| Cattle | 75,000 |
| Calves | 5,000 |
| Hogs | 200,000 |
| Sheep | 2,500 |

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stock industry, unless the discriminatory rates are continued; but that is prophecy.

"The court has no function where such forecasts of the future clash. Abstractly, speculation appears to be a feature of all open markets everywhere, and might continue at South Omaha, even without discriminatory commission rates in favor of speculators. But the future, and not the courts, must determine. It follows that the showing of probable loss to Tagg Bros. & Moorhead on the hypothesis of half rates to speculators, instead of full rates, as prescribed by the Secretary, is immaterial." (Italics supplied.)

Even in the *Denver* case cited by appellant there was one judge who thought that the resale charge involved in that case should have been upheld (57 F. (2d) 735, 755).

The findings expressly show the number of head of livestock to which the Secretary found the resale or reweigh charge would have applied had the rates prescribed by the order been in effect in 1931 and 1932 (R. 124). They show that the resale or reweigh charge, if it had been applied as contemplated by the order, would actually have applied to the following number of head of livestock during 1931 and 1932:

| Year | Cattle and calves | Hogs | Sheep |
|---|---|---|---|
| 1932 | 76, 560 | 180, 393 | 1, 939 |
| 1931 | 91, 730 | 267, 730 | 4, 059 |
| Average | 84, 154 | 224, 061 | [1] 2, 999 |

[1] The above figures on the amount of livestock to which the resale charge contained in the order would have been applied if it had been effective in 1931 and 1932 are compiled from Government exhibits 108, pp. 63-65; 121A, p. 60; 121B, p. 7; 121C, p. 14; 122, and 122A.

It is clear that the volume of resales and reweighs used as a rate factor by the Secretary is, as to each species, less than the two-year average of the receipts to which such charge would have applied.*

Appellant, however, contends that some of the livestock entering into the above compilation of resales and reweighs to which the charge would have been applicable in 1931 and 1932 was not, in fact, resold or reweighed for purpose of sale, but

* As for 1932 alone, the amount used as a volume factor is also less than the receipts of cattle and calves to which such charge would have applied, although the actual receipts of hogs and sheep for that year are shown to be slightly less than the volume factor used for those species. However, no one year can be regarded as a conclusive test.

rather was handled by order buyers (Br. pp. 89–90). Appellant thus contends that the revenue anticipated by the Secretary from the charge on resales and reweighs is predicated upon the erroneous assumption that order buyers would pay resale yardage. Appellant contends that by mistakenly including transactions of order buyers in the compilation of resales and reweighs for 1931 and 1932, the Secretary has overestimated the amount of revenue which would be received from this charge.

In order to understand the issue which appellant attempts to raise, the difference between the nature of the transactions handled by order buyers and the transactions handled by traders should be clearly stated. The facts with respect to the characteristics of these two types of business at the stockyards are not open to dispute. The trader purchases livestock on the market, always taking title. He then resells it. In reselling livestock, the trader bargains for a price and his profit is derived from obtaining a higher price than he paid. He does not buy or sell on a commission basis, but he buys and sells for himself (R. 30, 887). Often a trader will receive "orders" in the sense that packers, or others, will notify him that they want certain livestock, but in filling these orders he sells property to which he has title (R. 886–887).

Order buyers, on the other hand, buy *as agents* for packers located at other points. They do not take title to livestock in their own name.

They may buy from commission men or they may buy from traders.

A person may be a trader in some transactions and an order buyer in others. He may carry on a general business buying and selling livestock, and also represent some packer as an order buyer. Some persons are registered with the Secretary of Agriculture as both traders and order buyers (R. 570).

Appellant maintains that the Secretary erred in estimating the income from resale charges which appellant would collect under the prescribed rates, since it is contended the Secretary based his estimate of volume of resales "upon the assumption that *order buyers* would pay a resale yardage under the erroneous idea that they *are not order buyers but are dealers*" (Br. p. 89). In support of this contention appellant quotes some of the testimony of Mr. Symon, a partner of Corrigan & Symon. In this testimony Mr. Symon several times states that he has shipped hogs "on orders" and that he is registered as an order buyer. He does not, however, state (as appellant says) that he is not also registered as a dealer (trader), *and the fact is that he is registered also as a dealer* (R. 570). Mr. Symon's statement that he ships hogs on orders, of course, does not indicate whether such hogs are shipped by him as an order buyer or *on orders received by him as a trader.* The paragraph from Symon's testimony (quoted by appellant at the bottom of page

89 of its brief) does not establish, nor indeed does it even give an inference, that the 148,340 hogs referred to were shipped by him as an order buyer. Moreover, in quoting from Symon's testimony, appellant has omitted (at the point where an omission is indicated just before the last sentence quoted (Br. p. 89)) the important part of Symon's testimony which *proves conclusively* that the 148,340 hogs referred to would be subject to the rates in the Secretary's order for resales or reweighs for purpose of sale, bearing in mind that the prescribed maximum resale charge applies also to livestock "reweighed for purpose of sale" (R. 128). Thus, Symon at that point testified (R. 885–886):

> *These hogs that were shipped out to apply on orders were reweighed. We had to have the weight in order to know the amount of money that our customers would have to pay us.* Our customer has to have that weight and we have no other way of arriving at it. These hogs were just weighed to a number ["number" means the trader]. When these hogs are reweighed *they are reweighed* from Corrigan to a number, the number being a packer to whom they are going (R. 885–886).

Symon also testified "all the hogs that we buy are weighed to Corrigan & Symon and *we take title to them*" (R. 887).

The above testimony shows that Symon's firm had title to the 148,340 hogs in question, that it resold them, and that in so doing they were re-

weighed for purpose of sale. There can, therefore, be no doubt that these hogs would have been subject to the Secretary's prescribed maximum charge for resales and reweighs, and that the Secretary properly estimated the income that would have accrued had the full rates and charges been applied to Symon's transactions.

Appellant further seems to contend that these 148,340 hogs were not resold on the St. Joseph market (Br. p. 90). Of course, whether title technically passed at St. Joseph or not is immaterial, as these hogs were reweighed there for purpose of sale.

Appellant's principal attack on the resale yardage charge is based on this contention that the Secretary erroneously included order-buying transactions. To support this contention appellant relies principally upon Symon's testimony, but the above analysis of his testimony clearly shows that it does not support appellant's contention.

Furthermore, the correctness of the Secretary's figures as to resales and reweighs is conclusively demonstrated by Gov. Ex. 122, which contains an analysis of the volume of livestock actually handled by traders (dealers) as such, and the Secretary's estimate is based primarily upon the figures in this exhibit. The accountant who prepared this exhibit testified specifically that "The figures on Gov. Ex. No. 122 do not represent all the purchases made for the period indicated by all traders and all order

buyers. *They represent only trading accounts.* There were some other purchases made during this period on the St. Joseph Stockyards by order buyers which are not shown on the Exhibit" (R. 442).

Appellant further contends that the actual revenue obtained in 1932 from resales and reweighs is $20,803 less than the amount which the Secretary found to be obtained from the application of the tariff (Br. p. 88). In supporting this argument, appellant refers to a compilation of the number of head of livestock on which the resale yardage charge was actually collected in 1932, and the amount collected thereon (Br. p. 41). Comparison of the volume of livestock shown in this compilation with the volume of livestock shown in Gov. Ex. 122 to which the resale and reweigh yardage charge would have been applied, clearly shows that the compilation on page 41 of appellant's brief does not represent all of the livestock to which the charge is applicable. Appellant's compilation, therefore, is inaccurate or else it merely shows that in 1932 appellant did not actually apply its resale and reweigh charge to all of the transactions to which the charge under the Secretary's prescribed schedule would have been applicable.

It is therefore patent that appellant's whole argument on this point is based upon an application of the prescribed rates to the wrong volume figures.

C. THE MAXIMUM RATES AND CHARGES PRESCRIBED FOR FEEDLOT YARDAGE ARE LAWFUL AND THE SECRETARY'S ESTIMATE OF THE RETURN WHICH WILL BE YIELDED BY SUCH CHARGES IS NOT EXCESSIVE

(Appellant's Brief, Point X, p. 93)

Some of appellant's land is used in connection with the operation of various feedlots (R. 57). Formerly these feedlots were leased to outside parties for a rental, and they were being operated in this manner at the time of the first hearing, and in the findings of the Secretary following the first hearing the feedlots were found to be not used and useful, and their value was excluded from the rate base. (See Appendix to Appellant's Brief, pp. 27–29.) The leases to these feedlots, however, were not renewed, and since 1930 they have been operated under appellant's supervision and control by different persons to whom they have been allocated (R. 404, 817). A substantial portion of these feedlots is physically outside the regular stockyard area (R. 402–403).

Under the present method of operation of these feedlots, appellant imposes a yardage charge for their use. It is a per head charge of 35¢ or 15¢ for cattle (depending upon whether or not sheds and other inclosures are furnished), and 5¢ for hogs and 5¢ for sheep (R. 400).

At the second hearing further evidence was offered by appellant to establish that these feedlots are used and useful in rendering stockyard services, and that their value should be included in the

rate base (R. 58, 818). Witnesses for appellant, while contending that this property was used and useful, called attention to the fact that separate charges are made for the use of the feedlots (R. 817). The Secretary after this hearing found that the feedlots were used and useful (R. 58).

The action of the Secretary in including the value of this property in the rate base, therefore, brought into consideration separate property for the use of which appellant had been charging a separate rate apart from the rates charged for general stockyard services. If the value of this property, separately employed for a special though allied use, were to be treated as part of the rate base, obviously the reasonableness of the special rate charged by appellant for the use of this property would have to be considered. If the value of these feedlots had been excluded (because of findings of non-used-and-useful character) from the rate base, appellant would neither have been charged with income nor credited with expenses arising from their operation. But the inclusion of the value of these feedlots in the rate base, necessarily carried with it inquiry into the reasonableness of special charges in connection therewith. It was the Secretary's duty to see not only that such charges were reasonable, but also that they were non-discriminatory. The users of the feedlots are not entitled to special favors, and the rates charged them must be fair and reasonable in relation to the rates

charged the patrons of appellant's general facilities.

In applying these principles it was necessary carefully to analyze the function of these feedlots and their manner of operation. This was done by the Secretary, and attention will now be called briefly to some of the facts developed.

Livestock destined for the feedlots ordinarily goes through the process of purchase and sale in the stockyards. Such livestock is received in the commission division in due course, and it receives all the services incidental to the initial yarding and handling up to the completion of the sale and the weighing. In connection with such services appellant receives the regular yardage charge just as it does on finished livestock which, after sale, goes to the packing plants for slaughter. The livestock going to the feedlots is usually livestock which has been purchased by professional feeders and which, in their judgment, needs further feeding and finishing before it is sold for slaughter (R. 403).

The market facilities of the stockyards ordinarily function twice in connection with livestock sent to the feedlots—once before the animals are taken to the feedlots and again after they are finished and ready for slaughter (R. 405, 834). The length of time livestock is kept in the feedlots varies considerably, but the average length of time approaches 50 or 60 days. In the case of sheep the

feeding period is "approximately 30 days." Hogs "would average probably 50 days." For cattle "the average would be 50 to 60 days." Some of the cattle are fed for 100 days (R. 827).

Contrasted with livestock using the feedlots, animals brought to the market for immediate sale are seldom held in the pens for more than a day or two (Gov. Ex. 108, p. 66).

The relationship of the regular yardage charge under the existing rates to the feedlot yardage charge collected thereunder is as follows (R. 397, 400):

| | Regular yardage | Feed lot yardage |
|---|---|---|
| | *Cents* | *Cents* |
| Cattle | 35 | [1] 15 or 35 |
| Hogs | 12 | 5 |
| Sheep | 8 | 5 |

[1] The 35-cent rate only applies to cattle using special sheds and enclosures.

The Secretary found that the existing rates for feedlot yardage are unjustly discriminatory in that animals held in the feedlots employ the stockyards facilities for a much longer period of time than those consigned to the open market, although the rates for livestock consigned to the open market are much higher than those for livestock held in the feedlots. The Secretary found that it is unreasonable and discriminatory to charge such substantially higher rates for the use of appellant's regular facilities for only a day or two than is charged to patrons of the feedlots for their use for periods ranging from 30 to 100 days (R. 128).

Under the previously existing rates shippers of livestock to market for purpose of immediate sale were compelled to pay a substantial part of the return on the value of the investment in feedlots, although such shippers did not use the feedlot facilities. Lack of a sufficient return from the operation of the feedlots was reflected in a reduced net income for appellant, with the resulting need for higher rates for other services.

Having found that the old tariff was unreasonable and discriminatory, in part on account of the feedlot rates, an analysis was made to determine the value upon which the feedlots should yield a fair return. The area of the land occupied by the various feedlots is set out in Gov. Exs. 107; 107A, p. 1–7. The finding as to the value of the various zones in which the feedlots are located is set out in paragraph 121 of the order (R. 88). Relating the square foot area of the feedlots in each zone to the square foot land value thereof, it is found that the value of the land occupied by the feedlots is $211,660.* The total cost of reproduction new less

* This land value is determined as follows:

| Foot Area | Secretary's Value | Total Value | Foot Area | Secretary's Value | Total Value |
|---|---|---|---|---|---|
| Zone A, 383,410 | 0.16 | $124,483.36 | Zone II, 136,956 | 0.13 | $17,840.28 |
| Zone B, 394,611 | 0.16 | | Zone III, 200,640 | 0.08 | 16,051.20 |
| Zone C, 78,190 | 0.10 | 7,810.00 | | | |
| Zone E, 444,927 | 0.10 | 44,492.70 | | | 211,660.54 |
| Zone I, 1,966 | 0.50 | 983.00 | | | |

The areas in the above table are taken from Gov. Exs. 107 and 107 A. The unit values are taken from paragraph 121 of the Secretary's Order.

depreciation as determined from these exhibits is $157,532,** making the total cost of reproduction new less depreciation of structures, plus the value of the land used for these facilities, $369,192.

In arriving at a determination of what the reasonable charge should be for livestock using the feedlot facilities, the Secretary considered the expenses incident to the use of such facilities. The taxes and insurance properly allocable to the feedlot lands and structures were about $6,336 (Gov. Exs. 121A, 121B, 121C). Many of these structures are substantial in character and a large portion of the land is located within the limits of the city of St. Joseph and must, therefore, carry a higher tax rate than lands located outside the limits. The details upon which the segregation of such taxes and insurance were made will be found on pages 348–375 of Government Exhibit 121A. The repairs for the years 1927 to 1932 applicable to the feedlots averaged $311.55 per year (Gov. Ex. 121A, pp. 277–278). The depreciation allowance on feedlot structures which the Government accountant recom-

** This total value of structures is derived as follows:

| | |
|---|---|
| Horse and Mule Division, less blacksmith shop | $104,079 |
| Rockhold Feedlot | 11,241 |
| McKee Feedlot | 554 |
| Dutton Feedlot | 3,155 |
| Roundtree Feedlot | 12,248 |
| Total | 131,277 |
| Overheads | 26,255 |
| Total | $157,532 |

The above values are taken from Henrici's appraisal, Gov. Ex. 114, pp. 1–2, 5–6.

mended was $2,000. Therefore, the total direct carrying expenses of the feedlot properties is $8,647 ($6,366 plus $311.55 plus $2,000).

The value of the lands used as feedlots is $211,660.54, and the value of the structures is $157,532, making a total of $369,192. A return of 7% on this amount is $25,843.

Revenues of $34,490 would yield a return of $25,843 and also cover direct expenses of $8,647.*

The Secretary found that the volume of livestock reasonably to be anticipated annually to use the feedlots was, for cattle, 5,000 head; hogs, 1,200 head; and sheep, 85,000 head (R. 126).

That the Secretary's estimated annual volume of receipts for the feedlots is not unreasonable is manifest from the actual experience of the two and one-half years during which appellant has been collecting a yardage charge from this property. During such period the number of head of livestock handled in the feedlot facilities was as follows (R. 125; Gov. Exs. 121A, p. 121; 121B, p. 9; 121C, p. 24):

| | 1930 (6 months only) | 1931 | 1932 |
|---|---|---|---|
| Cattle | 4,086 | 4,998 | 2,321 |
| Hogs | 357 | 1,664 | 1,198 |
| Sheep | 39,882 | 121,901 | 52,385 |

* It should be pointed out that no allocation of other overheads has been made in arriving at the amount necessary to carry the feedlots. No administration charges, office expenses, or other general expenses have been considered as incident to the feedlot facilities.

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The rates permitted under the Secretary's order—that is, 60¢ per head for cattle, 38¢ per head for hogs, and 38¢ per head for sheep (R. 128) will produce the following revenue on the normal volume:

| | |
|---|---|
| Cattle | $3,000 |
| Hogs | 456 |
| Sheep | 32,300 |
| Total income | 35,756 |
| Cost plus fair return | 34,490 |
| Excess | 1,266 |

Thus the prescribed rates ought to yield revenues approximately $1,000 per year in excess of the amount necessary to carry the feedlot facilities.

As for the contention that the feedlots are part of the general stockyard operations and that they should not be made to bear a separate charge, it is pertinent to note that approximately only 3% of the livestock using the general facilities of the stockyards ever uses the feedlots (Gov. Ex. 121A, pp. 60, 122–125). In view of this, it was fair and just that those who use them should in a measure at least pay the bill.

Fixing of rates for services by comparison with rates for other services, and the fair balancing of rates for different services so that each is fair in relation to the other is a familiar part of the function of rate regulatory bodies. *Northern Pacific Railway Co.* v. *North Dakota,* 236 U. S. 585.

Appellant, however, attacks the Secretary's treatment of the feedlots upon four separately stated

grounds (Br. p. 96). Each of these contentions will now be answered:

(1) Appellant argues that the findings are insufficient. The Secretary, however, has specifically found that the existing rates are unreasonable and discriminatory, and in this connection has specifically mentioned the feedlots.* The Secretary has made specific findings as to volume handled in the feedlots (R. 124–125), and he has described the facilities and the type of service rendered (R. 57–58).

Appellant contends that the Secretary should have made specific findings of the value of the feedlots and the cost of their maintenance (Br. p. 96). The feedlots are physically located in zones which were valued, and the Secretary made his findings of land value (R. 88). The value of the feedlots can be readily ascertained by a simple arithmetical computation, applying the land unit value per square foot to the feedlot areas, which are all in evidence. This the appellee has done (*supra*, p. 137–138). It seems rather captious to suggest that the findings are inadequate because not setting out all the computations. There was no occasion or necessity to

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* The Secretary specifically found (R. 128):

"Moreover, under the existing schedule shippers of livestock who consign their animals to commission men are charged more by the respondent for the use of its facilities in handling such livestock for a shorter period of time than are those who use that portion of its facilities hereinbefore referred to as feed lots for a much longer period of time. It is found that the schedule of rates and charges now in effect is unreasonable and unjustly discriminatory."

break down this land value and make a separate finding of the feedlot value, when the question was simply one of removing a discrimination the existence of which, on the findings made, is obvious.

As for the necessity of making specific finding of the cost of maintaining the feedlots, again there appears no reason why this was required. Certain overhead expenses, a part of which is properly chargeable against the feedlot business as such, have been included in the general operating expenses (R. 120). It is respectfully submitted that there is no occasion, in connection with the Secretary's treatment of feedlots, requiring this Court "to spell out, to argue, to choose between conflicting inferences", as appellant suggests (Br. p. 97). The Secretary's findings leave perfectly clear what he did and why he did it.

(2) Appellant argues that it did not have a true hearing on the matter of feedlot rates; that it had no notice that an increase in such rates was under consideration (Br. pp. 97–99). In the order reopening the proceeding and giving notice of hearing, dated July 19, 1932, the Secretary gave notice that a "supplemental hearing" was to be held before an examiner at St. Joseph, Missouri, which would be "a general inquiry into the reasonableness and lawfulness of each and every rate and charge, and each and every rule and regulation affecting any rate or charge stated in any and all schedules of rates and charges filed by respondent, and in effect at the time of said hearing, for stock-

yard services rendered by respondent at the St. Joseph Stockyards" (R. 396).

At the time of the first hearing, appellant was leasing the feedlots, and since it was not operating them itself its published tariff did not prescribe a rate for the use of these facilities (R. 397–400; Gov. Ex. 108, pp. 1–6). Subsequently, but before the second hearing, appellant abandoned its policy of leasing the feedlots, undertook their operation itself, and published a separate rate for their use (R. 124, 400; Gov. Ex. 108, p. 9). This rate (along with "each and every [other] rate and charge") collected by appellant was clearly within the scope of the notice given. "The notice given by the Secretary was neither defective nor misleading." *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 440.

Appellant states that since the Secretary had, in the first order, excluded the value of the feedlots, and at the second hearing a witness for the Government had been of the opinion that they were not used and useful, "it was not assumed" by appellant that feedlots "constituted a part of the investigation" (Br. p. 98). But this hardly squares with the testimony of appellant's president and general manager who, at the second hearing, testified at length as to the need for including the value of the feedlots in the rate base (R. 817–820). The fact that a witness called by the Government opposed such inclusion would, of course, not bind the Sec-

retary, and appellant evidently did not regard the testimony of such witness as final because subsequently it called its president and general manager to urge feedlot inclusion. Inclusion of the value of the feedlots would naturally bring into question the special rates charged for these facilities.

(3) Appellant contends that the evidence does not support the conclusion that the returns from the feedlots are inadequate. It has already been pointed out that the evidence warrants separate treatment of these facilities, and higher rates for their services. Appellant has not proved that there are any special reasons why such lower rates for the feedlots are warranted, and the record does not support any inference that indirect benefits to the general ratepayers justify requiring them to maintain through higher rates feedlots which they do not use.

(4) Appellant maintains that the order of the Secretary is void as a matter of law, contending that where the basis for an adjustment of rates is the removal of a discrimination, appellant should be offered an alternative method to remove the discrimination (Br. 102–104). The cases cited by appellant clearly are inapplicable to the order of the Secretary. They arise under Section 3 of the Interstate Commerce Act (U. S. C. A., Title 49, Sec. 3 (1)), and they hold that a carrier must be permitted to remove a discrimination either by raising one rate or lowering the other. *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Texas & P.*

*R. Co.* v. *United States,* 289 U. S. 627. Those cases involved a different type of discrimination than that involved here. In those cases the discrimination arose from giving one competitor an advantage in rates over another, and the purpose in permitting the carrier to choose between raising one rate or lowering the other was to remove the unfair advantage as between competitors. In order to accomplish the result intended in those cases it was essential from the competitors' standpoint that the rates be equalized. Here, however, we are not concerned with discrimination in competition, but merely with the discrimination which arises from causing one group of patrons to maintain, through the payment of higher rates, services or facilities enjoyed by others at non-compensatory rates. The only purpose here in removing the discrimination is to relieve the users of the general stockyard facilities of the financial burden of supporting the feedlots when they do not use them, and the Secretary has done this by the rates prescribed.

So much for appellant's specific objections to the Secretary's treatment of the feedlots. Certainly appellant is not helped in its attempt to justify its present rates for these facilities by the testimony of its president and general manager, who said: "I do not know that I can say exactly as to how we arrived at the schedule of rates for feeding livestock in the feedlots" (R. 836). He further testified: "I made no specific study to see if the feed-

lots yielded a fair return on the value of the facilities so used * * * if I guessed about it I would probably say they do not" (R. 848).

The existing schedule of charges for these services has been set up without any attempt to determine the reasonable needs of the company or the shippers, and appellant is in no position to state that the present schedule represents all that can be collected until it has made a sincere attempt to collect the charges in accordance with the schedule prescribed by the Secretary. *Tegg Bros. & Moorhead* v. *United States,* 29 F. (2d) 750, 756. If there is any doubt concerning the confiscatory character of the rates, the action of the lower court in dismissing the bill, pending an actual application of the rates, should be affirmed. *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 173.

It is respectfully submitted: (1) That the Secretary has power to predicate a rate schedule upon a basis which will eliminate existing discrimination; (2) that the Secretary was warranted on the record in this case in finding that the existing schedule of feedlot charges was discriminatory; and (3) that the new rate schedule eliminates existing discriminations and in so far as the feedlot charge is concerned it is amply supported by the findings and the evidence.

D. THE RATES AND CHARGES PRESCRIBED BY THE ORDER OF THE SECRETARY ARE MORE THAN SUFFICIENT TO PRODUCE A FAIR AND NON-CONFISCATORY RETURN ON THE CONSTITUTIONAL FAIR VALUE OF APPELLANT'S PROPERTY AS FOUND BY THE SECRETARY

(Appellant's Brief, Points V, VII, and VIII, pp. 46, 69, 74)

In determining the net operating income which appellant will derive from the maximum rates and charges prescribed by the Secretary, and whether or not that income amounts to a constitutionally sufficient return, it is necessary, first, to consider the volume of business reasonably to be anticipated and whether, when the prescribed maximum rates are applied to that volume, they will produce a net return to appellant which will represent a fair return upon the fair value of appellant's used and useful property. The Secretary, after consideration of appellant's business over a test period of six years, made a finding as to the annual volume of receipts of livestock reasonably to be anticipated and also a finding of the volume of the sales of feed reasonably to be anticipated. These findings as to volume of receipts and sales of feed to be used as rate factors in prescribing maximum reasonable rates can be checked by comparison with the actual volume of receipts and sales of feed over the six year period covered by the record. It is also possible to apply the Secretary's rates to the actual volume of business during the six years preceding the hearing. The making of such an application plainly demonstrates that the prescribed maximum rates of the Secretary should not only produce in the future a net return in excess of a

fair return upon the fair value of appellant's property, but, moreover, the prescribed maximum rates would actually have produced such a return if they had been effective in the six-year period covered by the record.

Demonstration of the above facts requires consideration (1) of the fairness of the Secretary's findings of volume reasonably to be anticipated and the adequacy of the prescribed rates as applied to such volume to produce a fair return upon the fair value of appellant's property, and (2) the adequacy of the prescribed rates to have produced a fair return upon the fair value of appellant's property during the six years covered by the record if such rates had in fact been effective during such period. These questions will now be discussed separately.

(1) *The application of the prescribed maximum rates to the volume of business which the Secretary found could reasonably be anticipated each year produces more than a fair return upon the fair volume of appellant's property as found by the Secretary*

In the exercise of his statutory duty to prescribe just, reasonable, and non-discriminatory rates, the Secretary was, of course, bound to prescribe a schedule of maximum reasonable rates after he had determined that the schedule of rates and charges in effect was unreasonable and unjustly discriminatory. That this latter determination was required

is shown not only by the fact that the Secretary found that the existing schedule produces revenues much in excess of those necessary to pay the reasonable expenses of conducting appellant's business and a fair return upon the fair value of its property, but it is also shown by appellant's own compilation of its net operating income for five of the six years in question (Br. p. 55). Such compilation shows that appellant earned during the years 1927 to 1931, inclusive, net returns ranging from $223,461.37 to $339,267.11, or a return ranging from more than 8% to nearly 12½% upon the fair value of appellant's used and useful property as found by the Secretary ($2,743,000).*

In fulfilling his duty under the statute, after determining the value of the rate base, it was necessary to determine the volume of business reasonably to be anticipated each year at appellant's stockyards. It was not intended that the reasonable volume to be used as a rate factor would represent a figure below which the volume would never fall, but rather that such volume should represent a fair normal annual expectancy arrived at on the

*Taking the actual net operating income for each of the six years in question, as shown by appellant at pages 44 and 55 of its brief, and comparing the same with the fair value of the used and useful property found by the Secretary ($2,743,000) and the percentage returns for each year are indicated as follows:

| Year | Net operating income | Percentage return | Year | Net operating income | Percentage return |
|---|---|---|---|---|---|
| 1927 | $276,651.95 | 10.09 | 1930 | $279,029.72 | 10.17 |
| 1928 | 339,267.11 | 12.37 | 1931 | 223,461.37 | 8.15 |
| 1929 | 314,127.39 | 11.45 | 1932 | 190,656.21 | 6.95 |

basis of past experience. Consideration of the volume reasonably to be expected necessitated observation (1) of the annual volume of livestock of each species using the yard facilities and paying a yardage charge therefor during the test period, and (2) of the amount of feed that is annually sold.

Taking up, first, the volume of livestock of each species using the yarding facilities and paying a yardage charge, it should be noted that yardage revenues are derived from three general sources: (1) from charges assessed for yarding livestock arriving fresh from the country; (2) from charges made for yarding livestock resold or reweighed for purpose of sale; and (3) from yardage charges for the use of the feedlots.

In calculating probable income, the Secretary collected detailed data with respect to actual volume of each species handled at the stockyards. In so doing he considered separately the actual receipts arriving fresh from the country since the beginning of appellant's business history (Gov. Ex. 111). He also considered the actual volume resold and reweighed for purpose of sale, and the actual volume of livestock using the feedlots.

Although giving general consideration to the trend in receipts for more than thirty years, the Secretary gave particular attention to the six-year period from 1927 to 1932, inclusive. With respect to arrivals fresh from the country, the Secretary analyzed actual receipts of each species for a six-year period from 1927 to 1932. The actual receipts

for this six-year period were as follows (Gov. Exs. 121 A, p. 60; 121 B, p. 7; 121 C, p. 14):

| | Cattle | Calves | Hogs | Sheep |
|---|---|---|---|---|
| 1932 | 343,464 | 77,807 | 1,148,990 | 1,210,019 |
| 1931 | 406,946 | 77,412 | 1,227,341 | 1,443,881 |
| 1930 | 435,908 | 98,831 | 1,367,410 | 1,517,708 |
| 1929 | 471,074 | 92,054 | 1,541,710 | 1,460,732 |
| 1928 | 474,352 | 87,029 | 1,594,606 | 1,430,495 |
| 1927 | 511,008 | 101,579 | 1,359,683 | 1,215,028 |

The above table includes arrivals by both truck and rail.*

The volume used by the Secretary as a rate factor for all species by mode of arrival, follows (R. 126):

| | Truck | Rail |
|---|---|---|
| Cattle | 260,000 | 140,000 |
| Calves | 70,000 | 15,000 |
| Hogs | 1,306,250 | 68,750 |
| Sheep | 300,000 | 900,000 |

The above is clearly a reasonable estimate of volume for use as a rate factor, in view of the actual receipts during the six-year period analyzed.

* The breakdown of the above actual receipts as between arrivals by rail and by truck will be found in Government Exhibits 121A, p. 60; 121B, p. 7; 121C, p. 14. The trend of receipts, as shown by these exhibits, reveals unmistakably a shift from rail arrivals to truck arrivals in all species of livestock. This shift has been disclosed in the annual receipts for a number of years without recession. The significance of this lies in the fact that even in years when total receipts for a single species have decreased, there has been an increase in the arrivals by truck, *and the arrivals by truck carry a higher rate under the Secretary's order than arrivals by rail.*

The inherent fairness of the volume factors used by the Secretary is illustrated by the case of cattle. For five of the six years the total of fresh receipts of cattle was above 400,000 head per year.

In only one year—the exceptional depression year 1932—was the total of such receipts below the annual volume used by the Secretary as a rate factor, and it is reasonable to presume that 400,000 head is a fair normal around which the annual receipts of cattle will tend to fluctuate. It is to be noted that the Secretary did not adopt an average of the six-year receipts but instead gave weight to the relatively smaller receipts during the later years of the period as compared with the earlier ones. A similar comparison of the actual receipts of calves, hogs, and sheep with the volume used by the Secretary as a rate factor, respectively, for each species shows the conservative character of the Secretary's volume factors for each species.

The volume of livestock receipts in the past has been sensitive to business conditions. The receipts of cattle increased from a low point in 1914 to a high point in 1918, and then declined to another low point in 1921. There was an increase in receipts during 1922 and 1923, followed for two years by a steady period. Following 1925 and continuing until 1932 there was a decrease in cattle receipts. In the case of calves, receipts increased from 1914 to 1925, with the exception of a slight recession during 1920 and 1921. Subse-

quently there was a gradual decline in volume, with the exception of 1929 and 1930. Hog receipts have shown an even greater fluctuation, the low points occurring at shorter intervals. The receipts move in cycles. The Secretary had before him data showing the number of head of livestock of each species received each year for the 25-year period from 1908 to 1932, inclusive, and from these data he was able to make a comprehensive statistical analysis (Gov. Exs. 108, pp. 11–25; 121A, p. 60; 121B, p. 7; 121C, p. 14; see also graph in Appellant's Brief, p. 77). It is eminently fair to use a six-year test period when the period is so selected as to cover six years having such diverse economic conditions as the years 1927–1932, inclusive. During that period there occurred both the height of the period of prosperity and the depth of the period of depression.

The statistical analysis reveals that not only cyclical fluctuations in receipts are characteristic of appellant's business but that the years immediately preceding the dates of the hearings were years of comparatively low receipts. Past experience as disclosed by the chart reproduced in Appellant's Brief at p. 77 indicates that after several years of such declines there follows normally an upward swing, due to the cyclical trend inherent in the business. *Estimates which give due weight to actual experience during years of comparatively low receipts as the Secretary's estimates do are manifestly fair.*

With respect to livestock resold or reweighed for purpose of sale, and livestock handled in feedlots, the Secretary also had before him figures as to actual volume for a period sufficient to form the basis of an estimate of probable future volume. As for resales and reweighs, the record shows the number of head of each species to which the resale and reweigh charge would have been applicable in 1931 and 1932, *supra,* p. 127. As for the feedlots, the record shows the actual volume of each species using these facilities during the last six months of 1930, and all of 1931 and 1932, *supra,* p. 140. Inasmuch as appellant made a separate attack upon the Secretary's treatment of resales and reweighs, and feedlots, the volume of livestock affected by the rates and charges for these services and facilities has been considered in separate points, *supra,* pp. 120–147. It has already been demonstrated that the Secretary's estimate of volume in connection with these services and facilities is reasonable in the light of the actual receipts for the period considered.

Taking up next the volume of feed sold by appellant, the Secretary found that during the years 1927 to 1932, inclusive, appellant's sales of feed were as follows (R. 127):

| | 1927 | 1928 | 1929 | 1930 | 1931 | 1932 |
|---|---|---|---|---|---|---|
| Hay (Cwt.) | 92,680 | 98,307 | 87,005 | 76,897 | 69,792 | 54,222 |
| Corn (Bu.) | 131,503 | 138,608 | 123,387 | 104,822 | 80,552 | 56,215 |
| Oats (Bu.) | 2,423 | 2,868 | 2,565 | 2,140 | 2,899 | 1,219 |
| Bedding (Bale) | 18,153 | 18,776 | 20,611 | 15,913 | 14,990 | 11,830 |
| Milled and Mis. Feed (Cwt.) | 4,228 | 4,917 | 4,130 | 4,479 | 5,328 | 7,818 |

The Secretary then found that "for the purpose of determination of the reasonableness of rates the quantity of feed used as a rate factor is as follows" (R. 127):

| | |
|---|---|
| Hay | 60,000 cwt. |
| Corn | 65,000 bu. |
| Oats | 2,000 bu. |
| Bedding | 14,500 bales |
| Misc. Feed | 5,000 cwt. |

Comparison of the quantity of feed used as a rate factor with the actual amounts sold during the six years in question demonstrates that the volume of feed which the Secretary used as a rate factor is, with the minor exception of milled and miscellaneous feed, more conservative than the actual figure for any year of the six-year period except the exceptional depression year 1932.

After determining the volume of livestock receipts and of feed sales reasonably to be anticipated, the Secretary framed a schedule of maximum reasonable rates which would be more than ample to pay operating expenses and yield a fair return upon the fair value of the property, and in so doing the volume rate factors shown above were used. The Secretary has shown precisely in paragraph 208 of the order the result of the application of the prescribed maximum rates to the anticipated volume. He found that revenues would be realized from the various sources of income as follows (R. 129):

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| | |
|---|---|
| Yardage | $412,775 |
| Profit on Feed | 82,800 |
| Loading and Unloading | 22,500 |
| Feedlot Operations | 35,756 |
| Miscellaneous stockyard operations | 68,000 |
| Total | 621,831 |

He also found that the reasonable expenses which would be incurred by appellant in producing this income were as follows (R. 130):

| | |
|---|---|
| Miscellaneous operating expenses | $302,500 |
| Repairs, depreciation | 80,000 |
| Taxes | 43,767 |
| Total | 426,267 |

None of these expenses, with the exception of the item for repairs and depreciation, does appellant directly challenge.

Thus the net operating income under the Secretary's prescribed maximum rates as applied to the volume reasonably to be anticipated annually is as follows:

| | |
|---|---|
| Gross operating income | $621,831 |
| Reasonable operating expenses | 426,267 |
| Net operating income | 195,564 |

This net operating income of $195,564 amounts to a return of 7.13% upon the fair value of appellant's used and useful property. This clearly demonstrates that the prescribed rates when applied to the volume reasonably to be anticipated will yield more than a fair rate upon the fair value of appellant's property as found by the Secretary.

Appellant in an endeavor to demonstrate that the maximum rates prescribed in the Secretary's

order would not produce the net operating income found by the Secretary to be reasonable has made certain computations at pages 71–72 of its brief which are erroneous. Due to two innocent mistakes, these computations fail to show all of the income which would be derived from an application of the Secretary's rates. Thus, the only yardage revenue which appellant shows is $375,000 from general yardage revenues and $25,775 by applying the rates to resales and reweighs. The error in this computation arises from the fact that there is an unfortunate typographical error in the printed record as to the volume of hogs reasonably to be expected by truck. The record shows (R. 126) this volume to be 1,206,250 head, whereas the Secretary's original order served on appellant showed 1,306,250 head as the volume factor on hogs received by truck. This typographical error which appears in the printed record was first made in appellant's printed petition filed in the District Court in which appellant reprinted the Secretary's findings and order as "Exhibit A", and in reprinting paragraph 201 of the Secretary's findings in such exhibit the figure 1,206,250 was printed instead of 1,306,250. However, when appellant's printed petition containing the Secretary's findings and order was served upon the Government, it was checked with the original thereof and numerous typographical errors were discovered. Accordingly, on July 10, 1934, the Government filed a "Memorandum As To Certain

Corrections To Be Noted In Exhibit A of Petition" (R. 139–141). In this memorandum it is stated with respect to paragraph 201 that "in the table at the conclusion of the paragraph the figure given for hogs arriving by truck is 1,206,250, whereas it should be 1,306,250" (R. 140). Appellant, no doubt inadvertently, in making its computations at pages 71–72 of its brief, overlooked the memorandum in the record setting forth the correction. This error of 100,000 head makes a difference of $12,000 in the application of the rates (12¢ per head for receipts by truck). Thus the following computations check with the Secretary's application of his rates to the volume reasonably to be anticipated (R. 129):

| | |
|---|---|
| Full yardage estimated in decision | [1]$375,000 |
| Total resale revenue estimated in decision | [1] 25,775 |
| Error in calculation resulting from typographical error | 12,000 |
| Total, as shown in Secretary's order (R. 129) | 412,775 |

There is, moreover, a difference between appellant's calculation of profit on feed which amounts to $78,800 (Br., p. 72), and the Secretary's calcuculation of such profit which amounts to $82,800 (R. 129). This difference is due to the fact that appellant did not include feed annually sold to the Anchor Serum Company which the Secretary did include. The record shows that these sales had been annually recurring during the full six-year period and that they are a regular item of profit in

[1] As shown by Appellant's Brief, p. 71.

appellant's business (Gov. Exs. 121A, pp. 74, 83; 121B, pp. 7, 8; 121C, p. 17). Since this was a recurring item of profit, it was proper to include it in the calculation of appellant's anticipated income.

Appellant's other figures ($22,500 for loading and unloading; $35,756 from feedlot operations; and $68,000 from miscellaneous stockyards operations) check with the calculations of the Secretary as shown in paragraph 208 of the order (R. 129).

*(2) The application of the prescribed rates to the business of each year of the five-year period, 1927–1931, inclusive, would have produced far more than a fair return upon the fair value of appellant's property*

Not only can the maximum rates prescribed by the Secretary be tested with reference to the volume used as a rate factor in the order, but they can also be tested by applying them to the actual receipts of livestock and sales of feed during the period 1927–1932 inclusive. If the prescribed rates had been applied to the business of five of the six years of this period, 1927–1931, inclusive, they would in fact have yielded an average yearly net operating income of $266,237 or an average yearly excess over a fair return of approximately $74,227. (The year 1932 will be separately discussed, *infra* pp. 164–171.)

This is demonstrated by appellant's own figures for the five-year period, 1927–1931 (Br. p. 55) if

certain necessary adjustments in income and expenses are made which appellant fails to make, These adjustments are as follows:

(a) In making its computations, appellant includes as expenses amounts paid during those years for taxes on property not used and useful and the exclusion of which from the rate base appellant does not, with the exception of the Transit House, now challenge. If correction is made for taxes paid on property not used and useful, as well as for income tax on income from non-stockyard and extraneous sources, appellant's calculation of taxes for the five-year period is approximately $83,402 in excess of the amount at which taxes should be figured for rate purposes for stockyard services (R. 119).

(b) Appellant includes as expenses for each year $102,000 to cover repairs and depreciation, or $22,000 in excess of the amount found by the Secretary to be reasonable. This excess amounts to $110,000 for the five-year period. Furthermore, the Secretary in his order allocates $38,500 for current repairs and maintenance, as distinguished fom depreciation reserve. For five years this current repairs charge would amount to $192,500. As a matter of fact, during the five-year period, appellant actually expended for repairs only $156,096, or $36,404 less than the amount allowed for that purpose by the Secretary.

(c) Appellant annually received in normal course recurring refunds on casualty insurance, which for the five-year period amounted to $31,-816 (Gov. Ex. 121A p. 7, line 8), and which appellant has not included in its calculation either as income or as a decrease in expense.

(d) Based on appellant's experience for the years 1931–1932 there would have been an increase in appellant's revenue for the five-year period of $108,428 if appellant had applied the maximum rates for resales and reweighs permitted by the Secretary's order to all the business permitted by that order (Gov. Exs. 121A, p. 60; 121B, p. 7; 121C, p. 14; 122; 122A).

(e) In estimating the return which would have resulted from the application of the Secretary's rates to feedlot yardage, appellant fails properly to apply those rates. Appellant actually collected during the five-year period in question for feedlot yardage and feedlot rentals only $19,276. If to the business during two years, 1931–1932, there had been applied the higher maximum rates fixed by the Secretary, the income which would have resulted to appellant for the two years, 1931–1932, would have been not the $12,176 actually received, but $71,700, or a yearly average of $35,850. If the feedlot charge fixed by the Secretary had been effective during the whole period of five years, and if we assume that the average number of head to

which the feedlot charge applied during the two years, 1931–1932, may be taken as typical for the five-year period, it would have resulted during the entire period in an aggregate income to appellant of $179,250, or an increase of $159,974 over and above the amounts actually collected.*

In view of these necessary corrections, the items of receipts for the five-year period as calculated by appellant should be increased by an item of $31,816 for casualty insurance refunds, by an item of $108,428 for receipts from resale and reweigh charges,

* This is explained by the following table showing number of head of livestock handled in the feedlots in 1931 and 1932 (R. 125).

| | Number of Head | Rate | Amount |
|---|---|---|---|
| 1931 | | *Cents* | |
| Cattle | 4,998 | 60 | $2,999 |
| Hogs | 1,644 | 38 | 625 |
| Sheep | 121,901 | 38 | 46,322 |
| 1932 | | | |
| Cattle | 2,321 | 60 | 1,393 |
| Hogs | 1,198 | 38 | 455 |
| Sheep | 52,385 | 38 | 19,906 |
| 2-year total if prescribed rates had been applied | | | $71,700 |
| Average collections per year for 2 years | | | 35,850 |
| 5-year collections at same rate | | | 179,250 |
| Less revenues actually received during 5-year period | | | 19,276 |
| Net increase—additional revenues procurable under prescribed rates | | | $159,974 |

and by an item of $159,974 for feedlot yardage charges. At the same time, the items of expenses should be decreased by an item of $83,402 for tax adjustment, by an item of $110,000 for excessive charges to repairs and depreciation, and by a further item of $36,404 for charges for current repairs not actually made.

If these three items of excessive expense allowances are added to the three other items of insufficient estimates of receipts, the result is a total of $530,024 which must be added to appellant's estimate of $801,162 as the amount which appellant would have received during the five-year period, had the Secretary's rates been in effect. Instead of producing a total net return to appellant of $801,-162, those returns would accordingly have produced $1,331,186, or an average yearly net return of $266,237, instead of $160,233, as claimed by appellant. An annual net return of $266,237 represents a return of 9.7% on the constitutional fair value of appellant's property.

From the foregoing calculations, the year 1932 has been excluded because it is specially treated in the next section of this brief. If 1932 is included and similar corrections made, the average net return to appellant for the six-year period, 1927–1932, would be approximately $247,698 annually, or a net return of 9%, on the fair value of the property. This will appear from the calculations with reference to 1932 given in the next section of this

brief and which show that if the Secretary's rates had been in effect in that year, appellant would have received a net return of approximately $155,000.

(3) *It is improper to take the single exceptional depression year, 1932, as a basis for estimating the return from the maximum rates prescribed by the Secretary; but the application of those rates even to the business of that year would have produced a non-confiscatory return*

(a) As a Matter of Law It Is Improper to Take a Single Exceptional Year as a Basis for Estimating the Return From Rates

Appellant bases its principal calculations designed to prove the alleged confiscatory character of the prescribed rates upon the experience of one year alone—1932 (Br., pp. 39–46; 69–72). In a business having such marked cyclical trends as appellant's, it is obvious that the experience of one year does not reflect a true picture of normal business conditions at the stockyards unless that one year is so chosen with respect to the business history of many years that it can be shown to be in fact a normal year. Since it is difficult in a business having as many composite rate factors as appellant's to find a year which can be said to be normal in all respects, it is submitted that it is preferable to take as a test period a number of years which include different stages of the business cycle. It is further submitted that on this record the years 1927–1932, inclusive, consti-

tuted such years, and that it would have been unfair and unreasonable to have used as rate factors figures based either upon the high or the low years of such period. Rates based upon the experience of the high year alone would have been unfair to appellant inasmuch as appellant would have been required, in order to have earned a fair return under such rates, to secure business each year equal to that of the best year. Rates based upon the experience of the worst year alone would be equally unfair to the ratepayers since those rates would yield during each year of the cyclical upturn amounts progressively in excess of a fair return on the fair value of appellant's property. As this Court has said in *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1 (at p. 15):

> We think it was error to confine the investigation to, and base the judgment upon, that year alone. The precise subject of inquiry was, what would be the effect of the ordinance in the future. The operations of the preceding fiscal year, or of any other past fiscal year, were valueless if the year was abnormal, and were only of significance so far as they foretold the future.

In *Denver Union Stock Yard Co.* v. *United States*, 57 F. (2d) 735, a case arising under the same act as the case at bar, the District Court for Colorado, in holding that the Secretary erred in using a single year as a test period (in that case, 1929) said (at p. 753):

> There is ample evidence in the record that a fair estimate of earnings for the future cannot be predicated upon an examination of a single year of the past; that, in estimating earnings for the future, the business world generally studies the earnings for at least a five-year period in the past.
>
> * * * * *
>
> When the complete history of the business of the stockyards for a long period of years is available, we think it was error for the Secretary to predicate his rate upon the experience of a single and abnormally high year.

Obviously, fair rates in a business having fluctuating receipts will yield a higher rate of return in a good year than in a bad year. If such rates, however, are predicated upon a period of years sufficiently great to be representative, they will produce in good years a return in excess of that fair return used as a rate factor, and in bad years they will produce as revenue less than that used as a fair return in prescribing rates.

This Court has recognized that reasonable rates may yield less in years representing the valleys of depression than in prosperous years, and that the return actually yielded by reasonable rates may in bad years reach a percentage level which in good years would be confiscatory. In *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, the lower court had found that the rates involved in the order therein challenged would have produced returns

varying from 7½% in 1923 to 1927, inclusive, to 5½% in 1932 and this Court upheld that order. In *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 290, this Court upheld a rate order upon findings of the Commission that it would yield a yearly net return of 6½%, saying (at p. 290):

> In view of business conditions, of which we take judicial notice * * *, the rate allowed was adequate.

Although as a general principle it is thus improper to test the application of rates by the experience of a single year and the results of such a test would be irrelevant and immaterial, this is true to an obviously greater degree when the year in question happens to be the high or low year of a cycle. Specifically, it is improper to test the adequacy of the rates fixed in the order here challenged by the result of their application to the business of 1932 alone, since 1932 was so obviously an abnormal year, and the results of such a test are irrelevant and immaterial.

(b) Even in the Exceptional Depression Year 1932 the Rates Prescribed by the Secretary Would Have Yielded, if in Effect, a Non-confiscatory Return on the Fair Value of the Property

Nevertheless, the Government is quite willing to meet appellant on its own ground in projecting such a test. The year 1932 was the worst year of the depression period, and the low year of the cycle shown by the record. Yet the application of the pre-

scribed rates to the business of that year reveals that they would have produced in that year a non-confiscatory return, as even in that year, notwithstanding the low point in receipts, the prescribed rates, if they had been in effect, would have produced a net operating income of approximately $155,000, or 5.67% on the fair value of appellant's property as found by the Secretary.

This will appear from pointing out the errors in appellant's calculations.

Thus, appellant attempts to show that, had the Secretary's prescribed maximum rates been in effect in 1932, its net operating income would have been $109,172.91 or 3.9% on a rate base of $2,743,000 (Br. p. 45). Appellant's contention that under the prescribed rates it would only have earned in 1932 a return of over 3.9% is, however, unfounded because based upon computations in which income is understated and expenses overstated in some of the same respects as they were for the five-year period discussed in the preceding section of this brief (*supra*, pp. 159–163).

(1) In computing the income from resale and reweigh yardage charges, appellant has not used the volume figures representing the volume to which the resale and reweigh yardage charges fixed by the Secretary would have applied had the Secretary's order actually been effective in 1932. On the basis of the Secretary's findings the income from resale yardage in 1932 would have been $19,160

greater than that which appellant shows. This appears from the following table which compares the figures in column headed "Revenue Units" in lines 26–29 of the table on page 41 of appellant's brief with the findings in paragraph 196 of the Secretary's order (R. 124):

| | Number of head used by appellant | Number of head to which order would have applied | Difference | Rate | Increase |
|---|---|---|---|---|---|
| | | | | *Cents* | |
| Cattle | 18,869 | 76,560 | 56,503 | 17½ | $9,791 |
| Calves | 1,188 | | | 11 | |
| Hogs | 25,224 | 180,393 | 155,169 | 06 | 9,310 |
| Sheep | 470 | 1,939 | 1,469 | 04 | 59 |
| Error in appellant's calculation | | | | | 19,160 |

(2) Appellant has also omitted to take into account increased revenue which the Secretary allowed from feedlot yardage. There should be added to appellant's calculation of revenue for 1932 approximately $18,000 on account of additional revenue from the feedlots. This is shown by the following table resulting from a comparison of the amount of revenue which would have been derived from the feedlots in 1932 by the application of the Secretary's rates ($21,754) with the amount actually collected from these facilities ($3,320, as shown in the appendix to appellant's brief, p. 64):

| | Number of head to which rates apply | Rate | Amount |
|---|---|---|---|
| | | *Cents* | |
| Cattle | 2,321 | 60 | $1,393 |
| Hogs | 1,198 | 38 | 455 |
| Sheep | 52,385 | 38 | 19,906 |
| Total revenues collectible in 1932 under prescribed rates | | | 21,754 |
| Less collections actually made, as shown by appellant (Br. p. 64) | | | 3,320 |
| Additional revenues procurable | | | 18,434 |

The number of head shown in the above table to which the feedlot yardage charge under the Secretary's order would have applied in 1932 is taken from Gov. Exs. 121, A, p. 121; 121 B, p. 9; 121 C, p. 24.

(3) There are also included by appellant in its expense calculations for 1932 items which should not be considered. Thus, appellant has included in its expenses all taxes actually paid during the year 1932, and has made no deduction therefrom on account of taxes on property found by the Secretary to be not used and useful* (Br. p. 43). An appropriate deduction from total taxes on property found not to be used and useful would have resulted in reducing the expenses for which credit is taken by approximately $8,800 per year. This is clearly shown in paragraph 180 of the Secretary's order in which it is explained that approxi-

* It should be noted that, except for the Transit House, appellant is not challenging on this appeal the lawfulness of the Secretary's exclusion from the rate base of the value of various items of property found to be not used and useful.

mately $8,800 has been deducted for taxes allocable to non-used and useful property (R. 119). This calculation of $8,800 has never been questioned by appellant—yet in the computation at page 43 of its brief appellant has failed to make this deduction. Moreover, the amount of taxes claimed by appellant for 1932 includes all income taxes paid on account of income from property found to be not used and useful, and on income from other extraneous sources.

The foregoing adjustments in revenue and expense would have had the effect of making appellant's net operating income approximately $155,000, under a proper application of the Secretary's prescribed rates to appellant's 1932 business. Taking $155,000 as the adjusted net income for 1932 (instead of $109,172.91, as taken by appellant) and relating it to the fair value of appellant's property, the net return for 1932 is approximately 5.67%, which is clearly non-confiscatory in view of the economic conditions then prevailing.

## III. Miscellaneous Questions

### A. The prescribed maximum rates and charges are adequately supported by the findings, including the finding that the existing rates and charges are unreasonable and unjustly discriminatory

(Appellant's Brief, Points III and IV, pp. 29, 39)

Appellant complains of the absence of certain "basic or essential findings" (Br., p. 29). Thus appellant states that "no effort was made by the Sec-

retary or the Government witnesses to obtain the costs of *specific* services such as yarding cattle, yarding hogs, yarding sheep" etc. If appellant intends to suggest that explicit findings on the costs of rendering the different types of service stated at the bottom of page 29 of its brief are essential, appellant is plainly in error. Appellant's business does not lend itself to such minute cost analysis as to make feasible the allocation of general costs to each of the specific services which appellant renders. The whole question of the specific rate reductions ordered by the Secretary and their fairness in relation to each other is more fully dealt with at pp. 174–180, *infra*.

Appellant states that the only portions of the Secretary's findings that indicate how he reached the conclusions carried into the order are found in paragraphs 168 and 206 of the findings, which appellant has in part quoted (Br., pp. 30–31). Appellant, however, has improperly construed the Secretary's order inasmuch as the findings upon which the rate schedule is predicated are set forth in numerous paragraphs of the order and include findings with respect to the services rendered and the rates charged therefor under the existing schedule (R. 30–45); the used and useful character of appellant's property (R. 46–70); the valuation of used and useful land (R. 70–88); the value of appellant's structures based upon cost of reproduction new less depreciation (R. 88–106); the amount necessary to be allowed for working capital (R. 106); going

concern value (R. 107–112); determination of fair value based upon the foregoing (R. 112–113); fair rate of return (R. 113–116); reasonable net operating income (R. 116); reasonable operating expenses (R. 116–123); necessary revenue (R. 123); volume of business (R. 123–127); the unreasonableness of existing rates (R. 128); and concluding with a schedule of maximum reasonable rates based upon the foregoing, and with an application of those rates to the volume of business reasonably to be anticipated (R. 128–130). In view of these detailed findings of the Secretary, appellant's contention that the order lacks necessary findings merely because findings of gross and net income have not been expressly set up for each year in the order is clearly without merit.

Appellant also contends that there are no findings which support the increases in the feedlot rates (Br., p. 35). The Secretary's procedure with respect to the feedlots and his findings thereon have already been dealt with in this brief, *supra,* pp. 133–147.

Appellant contends that the Secretary's decision contains no specific findings as to the gradually diminishing receipts of livestock from all sources and corresponding reductions in income during the six-year period (Br. p. 36). The fact is that the Secretary made specific findings with respect to appellant's receipts of livestock during the six-year test period and the fluctuations in receipts of livestock for a period of 24 years (R. 124–126). He

also made findings with respect to the volume of each class of feed sold by appellant each year during the six-year test period (R. 127). From an examination of appellant's experience with respect to the receipts of livestock and the sales of feed, the Secretary made definite findings as to the normal volume of business which it was reasonable to expect appellant would handle and which the Secretary adopted as a rate factor (R. 127).

With respect to the contention that the order is void because the facts found therein do not show that the existing rates and charges were unreasonable during the last year covered by the hearing, the propriety of testing the order by the experience of one abnormal year has already been discussed, *supra,* pp. 164–167. It is submitted that the previously existing rates and charges which produced over a period of six years prior to the hearing an average annual return of 9% on the fair value of appellant's property were unreasonable at the time of the hearing, and that the record adequately supports the Secretary's express findings that such rates and charges were unreasonable at that time.

Appellant suggests that the District Court has not fairly complied with Equity Rule 70½. The District Court, on May 1, 1935, filed a "Memorandum Opinion and Findings of Fact" (R. 910–938). In addition to reciting detailed findings of fact and conclusions of law in the "Memorandum Opinion and Findings of Fact", all of which were separately stated under heads and subheads, the Court also

adopted as its own (with certain minor exceptions) the detailed and specific findings of the Secretary of Agriculture. It is submitted that this fully complies with the equity rule.

B. THE VARIOUS PRESCRIBED MAXIMUM RATES AND CHARGES ARE FAIR AND REASONABLE IN THEIR RELATION TO EACH OTHER, AND THE SPECIFIC REDUCTIONS PRESCRIBED BY THE SECRETARY ARE FAIR AND REASONABLE

(Appellant's Brief, Point VI, p. 60)

Appellant attacks the rate schedule on the ground that the Secretary did not have before him evidence on the cost of rendering specific stockyard services (Br. pp. 60–69). It is contended that the prescribed maximum rates and charges constitute in some instances reductions in percentages which vary as to rates for the different specific services, while in other instances no reductions at all have been made and in still other instances the prescribed maximum rates exceed the rates and charges now in effect, and that there is no evidence to support reductions in the rates for different services by percentages which vary.

In approaching the question of the cost of rendering services, the Secretary did not attempt to arrive at differentiated costs for each service. The character of appellant's business is such that it does not lend itself to a satisfactory cost analysis upon that basis. Appellant does not keep its records and accounts in such a manner as to determine the exact cost of rendering each service. Although the performance of the various functions in the rendition of stockyard services is

specialized to the extent that there are different operating departments, there is the greatest degree of flexibility of organization in order that those who are assigned to certain tasks at one time may be shifted to the performance of other tasks when their services are needed. Appellant's business, except for the feedlots, is operated largely as a unit in the performance of the different services for which rates are charged.

If an attempt were made to determine the functional costs of the differentiated services, many questions would arise as to the practicability of allocating various expenses to the different services performed. The record contains no evidence which would indicate that such an excursion into cost analysis would serve any useful purpose. Any attempt so to allocate costs would lead the Secretary beyond the field of reality and into the field of controversial and academic problems of cost distribution. The Secretary properly declined to be projected into such a speculative undertaking.*

The Secretary properly recognized that in addition to the cost of rendering services, the value of the services should be considered. Accordingly, in prescribing maximum reasonable rates he took

* In *Union Stock Yards Co, of Omaha* v. *United States*, 9 F. Supp. 864, the same contention was made as herein with respect to alleged lack of evidence as to cost of specific services. In rejecting the contentions, the District Court said (at pp. 878–879):

"It appears that the plaintiff's business is operated largely as a unit in the performance of the different services for which rates are charged and the character of the business

into account the interests of shippers also and undertook to prescribe maximum rates upon a basis that is equitable to them. In thus balancing the interests of all the parties, the existing percentage relationship of the rates to each other may be altered, but that does not make the prescribed rates illegal.

With respect to the rates which are unchanged by the Secretary's order, it should be observed that these rates affect what may be termed "incidental services" and that the gross income from these rates is so small that any change which might have been made in them would have had little or no effect on appellant's gross or net income. The particular adjustment in the rate schedule to which appellant objects is the greater reduction in the rates for rail shipments than for truck shipments* (Br. pp. 67–68). Appellant contends that there is not a "scintilla of evidence which will justify a greater reduction in yardage for rail than for truck shipments" (Br. p. 67). But the evidence amply justifies the

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is such that a cost analysis on the basis of differentiated costs for each separate service would not be feasible nor would it serve any practical, useful purpose. Although the performance of the various functions by the plaintiff in the rendition of the services is specialized to the extent that there are different operating departments, there is flexibility in the organization in order that those who are assigned to certain tasks at one time may be shifted to the performance of other tasks at other times, and there is close inter-relation of operating departments."

* It will later be brought out that there is a decided trend in mode of arrival, for all species, from rail to truck, *infra*, pp. 178–180.

action of the Secretary in making a greater reduction in yardage for rail arrivals.

The reasonableness of making less of a reduction in yardage rates for truck arrivals than for rail arrivals is illustrated with the case of cattle. Under appellant's existing tariff, the rate on cattle arriving by rail is 35¢ per head and the rate on cattle arriving by truck is 40¢ per head. On cattle arriving by rail appellant receives, in addition to its yardage and profit on feed, a loading and unloading fee, which is paid by the railroad, amounting to $1.25 per single-deck car (Gov. Ex. 121A, p. 92). On a car of cattle containing 25 head this amounts to about 5¢ per head and practically offsets the difference between the rail and truck rates.

Moreover, truck arrivals consume less feed than rail arrivals, hence appellant's feed revenue from truck arrivals is less. One of appellant's witnesses presented a detailed study to show the differences in the quantities of feed consumed by livestock arriving by rail and that arriving by truck, and the loss resulting from the transition of receipts of livestock from rail arrivals to truck arrivals. In the case of cattle and calves, the witness showed that in 1932 cattle and calves arriving by rail consumed 868 pounds of hay per hundred head, whereas cattle and calves arriving by truck consumed only 442 pounds, the difference being 426 pounds per hundred head in favor of rail arrivals (R. 880). Applying the feed spread prescribed by the Secretary, it is apparent that the revenue on feed from rail

arrivals is 2.6¢ per head greater than that from truck arrivals.

The Secretary's order increases by 3¢ per head the previously existing differential between the yardage rate on rail arrivals of cattle and that on truck arrivals. The previous differential of 5¢ per head was about sufficient to compensate for the loss of loading and unloading revenue brought about by the trend away from rail arrivals toward truck arrivals, but it did not cover the loss of feed revenue brought about by this trend. The addition of 3¢ per head to this differential, making a total differential in the schedule of 8¢ per head offsets the loss of revenue from feed. The recognition of these facts attendant upon the transition in mode of arrival was not only reasonable, but, it would seem, imperative, in the framing of a schedule of maximum reasonable rates. Such recognition operates to appellant's advantage, and appellant is not in a position to complain. Appellant's challenge (Br. p. 67) to the Government "to point to a scintilla of evidence which will justify a greater reduction in yardage for rail than for truck shipments" would seem to have been fully answered by reference to the above undisputed facts as to the loss of the loading and unloading charge and of feed revenue through the change in mode of arrival. The same situation exists as to hogs (R. 883), hence the Secretary also increased the differential between truck and rail receipts as to that species (Appellant's Br. p. 65).

Appellant contends that upon finding its total net operating income to be unreasonable, the only order which could have been justified would have been a proportionate percentage reduction in all of its charges (Br. p. 68). This assumes that the degree of unreasonableness of each and every rate will always be the same and will always bear the same inter-rate relationship. It also assumes that it is practicable to preserve every inter-rate percentage relationship, as though there were something inviolate about a percentage relationship.

Sufficient evidence was received as to the manner in which livestock is handled at St. Joseph on which to predicate a schedule of maximum rates that is fair in its structure. The burden of proof is on appellant, and appellant has not proved that the Secretary's order violates any of appellant's rights by prescribing maximum rates which in some degree change the existing inter-rate percentage relationships.

C. THE FINDINGS OF THE SECRETARY WHICH WERE THE BASIS OF HIS EARLIER ORDER ENTERED IN 1931 WERE NOT RES JUDICATA, AND THEY WERE NOT BINDING UPON THE SECRETARY IN PRESCRIBING MAXIMUM REASONABLE RATES AFTER THE SECOND HEARING IN 1933

(Presented in Several of Appellant's Points, notably Point V, pp. 47–50; Point XI, pp. 104–106; Point XII, pp. 112–113; and Point XV, pp. 171–172)

In arguing several of its points, appellant has relied upon certain findings of the Secretary which were made after the first hearing and upon which the first order of the Secretary, entered in 1931, was based. Appellant has set forth in the appen-

dix to its brief the findings and order of the Secretary in this earlier proceeding (Appendix to Appellant's Brief, pp. 10–63). Thus, appellant points out that in the first proceeding the Secretary found that the value of the Transit House should be included in the rate base (Br., p. 105); that a separate allowance should be made for going concern value (Br., p. 112); that $102,000 should be allowed to cover repairs, maintenance, replacements, and a reserve for depreciation (Br., p. 137); and that the land in Zone A had a value of 25¢ per square foot (Br., p. 161). On the other hand, appellant contends that because the Secretary had in the first proceeding excluded from the rate base the value of the feedlots appellant assumed that the same would be done in the second hearing (Br., p. 98). Appellant, in effect, seeks to establish that the findings made in the first proceeding are *res judicata* (notwithstanding that in the court proceeding attacking the first order appellant contended that the findings upon which that order was based were not supported by substantial evidence or by the weight of the evidence).

Appellant's novel contention that the order which it sought to have set aside as unlawful is *res judicata* requires consideration and analysis of the holding of the District Court in the suit brought by appellant to set aside the first order of the Secretary, and also of the administrative proceedings which followed the granting of an injunction by the District Court in the first case. In *St. Joseph*

*Stockyards Co.* v. *United States,* 58 F. (2d) 290 (the case involving appellant's attack upon the first order of the Secretary) three principal questions were involved: (1) The power of the Secretary to value appellant's property in connection with prescribing rates; (2) the reasonableness of the rates prescribed in view of the record, and whether such rates were confiscatory (which involved in general the same sort of attack upon the first order which appellant has made herein upon the second order); and (3) whether by reason of changed economic conditions, which were urged upon the basis of evidence heard before the court, the enforcement of the order of the Secretary should be enjoined (58 F. (2d) 293).

The court held (1) that the Secretary had power to hear evidence and make findings on property value; (2) that it was not necessary to pass upon the reasonableness of the rates on the question of confiscation as presented by the allegations attacking the Secretary's findings; and (3) that the Secretary should have granted a petition for rehearing alleging changed economic conditions and that, on the basis of evidence offered by appellant before the court, the enforcement of the order under the changed conditions would have been unreasonable and confiscatory. The court granted an injunction solely on account of the proof of changed economic conditions since the entry of the order.* The Gov-

* The court said (at p. 297):

"The rehearing should have been granted. Failure to grant it left to the petitioner no other recourse in the pres-

ernment had contended that this evidence was inadmissible at the court hearing, which was held prior to the decision of this Court in the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248, and holding such view, the Government did not introduce any rebuttal evidence on the factual questions arising from appellant's claim of changed economic conditions.

After summarizing appellant's contentions respecting the Secretary's findings, the court, plainly showing that it was not passing upon these contentions, said (at p. 295):

> It is not necessary to decide them, since the conclusion has been reached that an injunction must issue because of the refusal of the Secretary to grant to the petitioner a reopening of the proceeding and because of the proved confiscatory effect of the rates fixed by the Secretary's order when applied to the business of the petitioner in the years 1930 and 1931.

Following the above-quoted sentence, there was a footnote in which the court indicated that there was among the judges a two to one division of opinion as to the adequacy of the evidence to support the

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ervation of its constitutional rights than to present to this court the facts showing changed conditions and the effect they would have if the Secretary's order was enforced. That testimony clearly shows that the enforcement of the order of the Secretary under the conditions as changed would result in a confiscation of the petitioner's property in violation of the due process clause of the Fifth Amendment."

Secretary's findings, and also upon the scope of judicial review. It should be carefully noted, however, that this footnote was prefaced by the following sentence:

> *Although the court does not in this case decide the questions referred to,* they have been given careful consideration. [Italics supplied.]

So it is plain that the court did not pass upon the lawfulness of the Secretary's findings, but decided only that changed economic conditions rendered the rates confiscatory.

The opinion of the District Court in the above case was rendered April 16, 1932. On July 19, 1932, Secretary Hyde entered an order reopening the proceeding (R. 394–397). In the order reopening the matter the Secretary (after reciting the facts relating to the previous order and the instituting of a suit to enjoin its enforcement) stated (R. 395):

> A temporary injunction was issued in accordance with the prayer of the bill and, after a hearing at which the Court received evidence in support of the allegations respecting changed economic conditions, the injunction was made permanent, it being the opinion of the Court that the Acting Secretary erred in denying the prayer of respondent's petition for a rehearing. The Court based its opinion in this regard upon the decision of the Supreme Court of the United States in the case of *Atchison,*

*Topeka and Santa Fe Railway Company* v. *United States*, 284 U. S. 248, decided January 4, 1932.

[fol. 843] *In view of the above mentioned decisions, the Secretary of Agriculture is of opinion that it is his duty, under the law, to reopen this docket and hold a rehearing to the end that all parties may be given opportunity to present such evidence of changes, both general and particular, which have occurred since the year 1929 as may be material to the issues raised by the order of inquiry herein; and also to the end that all parties may have opportunity to present such other evidence as may be material to said issues;* and further to the end that a general inquiry may be had into the reasonableness and lawfulness of each and every rate and charge, and each and every rule and regulation affecting any rate or charge stated in any and all tariffs or schedules of rates and charges filed by respondent and now in effect for stockyard services rendered by it at the St. Joseph Stockyards, South St. Joseph, Missouri, * * *. [Italics supplied.]

Not only did the Secretary reopen the case on account of the District Court's decision, but he further vacated and set aside the first order. Thus the order of July 19, 1932, reopening the proceedings, stated (R. 396):

*It is ordered that the aforesaid order of the Acting Secretary of Agriculture entered*

> *in this docket on July 20, 1931, be and the same hereby is vacated and set aside; and that this docket be and the same hereby is reopened.* [Italics supplied.]

The Secretary then proceeded to order a new hearing, and provided that the record made in the first hearing should also constitute part of the record in the instant proceeding (R. 396). Thus, although the evidence taken at the first hearing was expressly made part of the record in the present proceeding, *the first order of the Secretary has no present status whatever, first, because it was set aside by the District Court on account of proved changes in economic conditions, and, second, because it was expressly vacated and set aside by the Secretary.*

Even, however, if the first order had been sustained by the District Court, it would not have been *res judicata.* It might have been sustained and applied, and then later have become confiscatory on account of changed conditions which subsequently might have required its modification. In *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, the order involved was sustained. Nevertheless, this Court said (at p. 445):

> He [the Secretary] has the power and the duty to modify his order, if new evidence warrants the change. * * * A rate order is not *res judicata.* Every rate order made may be superseded by another.

Other cases also support the view that (quite apart from the previous court decision setting aside

the first order, and its subsequent revocation by the Secretary) the first order was not binding on the Secretary in the second proceeding. In *Clark's Ferry Co.* v. *Public Service Commission of Pennsylvania,* 291 U. S. 227, it appeared that the Commission had valued the Company's property at $767,800 in an order entered June 8, 1926. Another proceeding was instituted in January 1930, and in that proceeding the Commission found that the Company's property as of February 2, 1932, was still $767,800. As one ground for setting aside the order based upon the second finding, the Company urged that the Commission had treated its 1926 decision as *res judicata* although the value of its property was greater in 1932 than it had been in 1926. *If the Company's contention in this respect had been well founded, it presumably would have constituted a ground for setting aside the order,* but this Court held that the Commission had not regarded its first findings as *res judicata,* but had "received evidence as to alleged changes in value and estimates of the cost of reproducing the property", and had determined that cost conditions had not changed materially since 1926, and "upon a complete examination of the entire record in both proceedings" had "found that the fair value of the property was $767,800 as of February 1932."

Appellant, in seeking a rehearing in the first proceeding, ran the risk that if it had been granted the Secretary might have heard evidence showing

lower valuations than had existed at the time of the first hearing (1929). There was a severe recession in economic conditions throughout the country after the 1929 hearing—a recession of which this Court has taken judicial notice. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, 260. That recession, of course, affected property values, and its full force had been felt at the time the second hearing commenced (January 10, 1933).* Obviously, in seeking the rehearing it had been appellant's purpose to introduce before the Secretary evidence of the type which was later offered before the District Court—evidence concerned primarily with an alleged decline in net operating income. See 58 F. (2d) 290, 296. In holding that the Secretary should have granted the petition for rehearing, and that the evidence offered by appellant before the court indicated that in view of changed conditions the order was confiscatory, the District Court in that case said (at p. 297):

> This conclusion indeed assumes that the valuation found by the Secretary is still a fair valuation of petitioner's property. But it is proper that that assumption be made. The rates for services ordered by the Secretary are predicated upon that as-

* The downward trend of property values during the period between 1924 and 1932 was apparently given consideration by this Court in *Clark's Ferry Bridge Co.* v. *Public Service Commission of Pennsylvania,* 291 U. S. 227, 236.

> sumption. Without it the order is invalid as having no foundation. It will not do to say that changed conditions also may have greatly depreciated the fair value of the petitioner's property. The valuation fixed is the only valuation in the case, and it cannot be questioned and at the same time affirmed. The petitioner must indeed show that the rates for services are confiscatory, but is not required to show the valuation is still that which the Secretary, not only admits, but contends, is a fair valuation.

Thus the holding of the District Court was predicated upon the valuation of the property which had been made in 1929—the only valuation which was in evidence before the court. The court, however, as shown above, expressly recognized that the rates in question might not have been confiscatory if judged in relation to a different valuation.

In the order of July 19, 1932, reopening the proceeding, the Secretary expressly directed that the hearing should be a general inquiry and that full evidence should be taken on all pertinent questions, such evidence to be considered in addition to the evidence that had been taken at the first hearing. Obviously, it was proper and necessary to take new evidence on *value* as well as new evidence on receipts. The purpose was to bring the record up to date in every respect. The final result might be rates either higher or lower than those first prescribed.

Appellant, having successfully enjoined the enforcement of the first order solely because it was not based upon depression conditions, should not now object to the second order because it took those conditions into account. Appellant, having obtained a decree setting aside the first order, is now in the anomalous position of urging that the second order is confiscatory because in some respects it does not reach the same result as the first order. Obviously, when a new hearing is granted on account of changed economic conditions, lower values and rate of return are quite as pertinent factors as lower revenue, and appellant cannot claim the benefits of one without accepting the consequences of the other.*

For the foregoing reasons, it is submitted that all references in appellant's brief to the findings of the Secretary in the first proceeding are irrelevant and immaterial, and should be disregarded.

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* Nor is appellant warranted in citing orders of the Secretary which have been entered in the past at other stockyards in which certain items respecting valuation or other matters have been given different treatment (Br. p. 124). As this Court said in *Virginian Ry.* v. *United States*, 272 U. S. 658 (at pp. 665–666):

"This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, *or with the alleged inconsistency with findings made in other proceedings before it.*" [Italics supplied.]

See also *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 551; *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co., et al.*, 284 U. S. 370, 389.

D. THE SECRETARY PROPERLY DENIED THE PETITION FOR REOPENING AND FURTHER HEARING PRESENTED TO HIM IN FEBRUARY 1934, AFTER THE SECOND HEARING AND PRIOR TO THE MAKING OF THE ORDER HEREIN COMPLAINED OF

(Appellant's Brief, Point XVI, p. 176)

On February 2, 1934, nearly a year after the conclusion of the second hearing, appellant filed with the Secretary of Agriculture a "Petition for Re-Opening and Further Hearing" (R. 15–19). It alleged that since the close of the hearing there had occurred "such substantial changes in circumstances and conditions which affect the value of respondent's property, its income, and probable receipts of livestock and expenses at its yards", that the record at the hearing "no longer represents fairly the present conditions affecting respondent's operations, nor does it afford a proper basis for an estimate of respondent's income and expenditures during the period within which an order such as is proposed herein would be in force" (R. 16).

The "changes in circumstances and conditions" specifically alleged were (1) the enactment of the Agricultural Adjustment Act, approved May 12, 1933, with its avowed purpose of reducing the number of hogs to be marketed in the future and the probability that cattle and sheep might also be brought within the scope of the reduction program; (2) the enactment of the National Industrial Recovery Act, approved June 16, 1933, which it was alleged would increase appellant's operating expenses; (3) the reduction of the gold content of the dollar from which "it will necessarily follow" that

the fair value of appellant's land and structures will be much greater than that determined by the engineers and appraisers who testified at the hearing; and (4) that appellant's net income for 1933 was less than the amount found by the Secretary to be a fair net operating income. On the basis of the above allegations, the Secretary was asked to re-open the proceedings for further hearing. The Secretary denied the petition (R. 29).*

That the "Petition for Re-Opening and Further Hearing" did not state facts requiring a rehearing is apparent from the following analysis of its allegations:

(1) As for the paragraph with respect to the Agricultural Adjustment Act, the Secretary himself, in denying the petition, stated that the livestock reduction program was experimental and that its effect upon appellant's particular business was problematical (R. 27). Even if a rehearing had been held, only speculative opinion could have been introduced as to the probable effect of the program on appellant's business. The Secretary properly concluded that there was then no present reason for re-opening the case to hear opinions as to the possible effect of the Agricultural Adjustment program upon volume of receipts. Appellant undertakes to support its contentions with respect to the petition for rehearing by citing certain figures which purport to represent receipts in 1935, saying

* The reasons for denial of the petition are set forth in detail in the order, paragraphs 6c and 6h (R. 26–29).

these figures could have been introduced if the case had been re-opened and would have shown the results of the Agricultural Adjustment program on appellant's business (Br. pp. 182–184). In answer it is enough to say that these figures (since they purport to relate to 1935) *were unknown to appellant when the petition for rehearing was filed and that the petition was not based upon such figures, and that, moreover, such figures are not in the record and could not have been put there even if a rehearing had been granted in 1934.*

(2) As for the paragraph with respect to the National Industrial Recovery Act and the effect thereof upon appellant's expenses, the Secretary made an investigation through accounts and, as shown in the findings (paragraphs 6e and 6f, R. 27–28), the investigation indicated that the allegations with respect to increased labor costs due to the National Industrial Recovery Act were not well founded.* The speculative character of the allegations with respect to increased labor costs for the future as a result of the National Industrial Recovery Act is only emphasized by the fact

* This investigation by the Secretary was made over appellant's protest that such an investigation should not be made without formal hearing and right of cross-examination. The purpose in making the investigation, however, was merely to determine whether there was a reasonable basis for re-opening the case. *The result of the investigation did not in any way receive consideration in the formulation of the rate schedule.* In this respect the situation is entirely different from that involved in *Interstate Commerce Commission* v. *Louisville & N. Ry. Co.*, 227 U. S. 88, relied upon

that, within a little more than a year after the petition for re-opening was filed, this Court declared the National Industrial Recovery Act unconstitutional. *Schechter Corp.* v. *United States,* 295 U. S. 495.

(3) As for the paragraph with respect to the effects of governmental monetary policy upon appellant's business, those allegations also were purely speculative and there was obviously no evidence that could have been offered at the time the re-opening was requested which would have had any probative value in determining the future effect of this policy on appellant's business.

(4) With respect to the allegations that the rates of the Secretary, if applied to the business in 1933, would have produced a net income less than that found by the Secretary to be reasonable, this of itself did not require re-opening. When the petition was presented, the Secretary had a careful examination made of the books containing the figures

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by appellant (Br. p. 179). It was entirely proper for the Secretary to make this informal investigation to determine whether or not the petition for re-opening was reasonably well founded. If the Secretary had no such right, it would follow that he was bound to pass blindly upon the question whether a petition for rehearing should be granted, or else be bound to grant a rehearing in order to determine whether or not he should grant a rehearing. This latter course would lead to a vicious circle and would pave the way for perpetually prolonging rate proceedings.

on which the allegations were based, and as a result of this investigation he concluded that the allegations were not supported and did not require a rehearing (R. 26–29). The Secretary was justified in making this examination, not for the purpose of gathering material for use in prescribing rates, but to determine whether or not the allegations had sufficient merit to require a reopening. In the light of the Secretary's findings after this examination, it is submitted that he was justified in refusing to reopen the case, and that the mere making of such allegations *per se* did not require a reopening. As stated by the District Court in passing upon this contention (R. 912):

> As to the estimated effect of these rates if applied to 1933 business, the difference between the amount which is claimed would have been earned thereunder and the amount found by the Secretary to constitute the reasonable net return is too small to be taken as a guide for a rate. It is to be expected that any business will have annual fluctuations. Rates are not based upon the result of the business of any one year alone but upon what is estimated as being the average business over a proper term of years, the future being gauged by the past. The past years here taken by which to gauge the future include six years, two of which were deeply affected by the depression. The experience before the Secretary was up to ten days before the date of the hearing.

After discussing all of the grounds urged by appellant for reopening, the District Court concluded (R. 912–913):

> All of the above contentions involve effects upon the business of petitioner which are entirely uncertain and unpredictable with any degree of accuracy. They are being urged in connection with the rates in the order here challenged. Only actual experience under such rates can furnish any real criterion or guide as to the effects urged. This experience should be obtained by practical test. No sufficient showing appears for not making such test to determine these matters which are o fsuch doubtful and uncertain influence. The case should not be reopened at this time. If actual experience hereafter for a proper period under the rates fixed by the order reveals sufficient reasons, the order can then be challenged through the proper channels.

It is submitted that this conclusion was correct. The rate-making power would be nullified if the rate-making authority were required to re-open proceedings every time allegations were made with respect to some changes in economic life affecting the petitioner's business. The decisions of this Court do not require re-opening as a matter of course every time a petition to that end is presented to the rate-making body. In *Atchison, Topeka & Santa Fe R. R. Co.* v. *United States,* 284 U. S. 248, this Court held that an order of the Interstate Commerce Commission should have been enjoined by

the lower court upon a showing that a petition for rehearing (alleging radically different facts from those existing when the record before the Commission was closed) had been denied. In that case the record before the Commission had been closed in September 1928; a petition for rehearing had been presented in September 1930, and a second petition for rehearing had been presented in February 1931. This Court, in holding that the carriers were entitled to a rehearing, held that the record before the Commission "pertains to a different economic era and furnishes no adequate criterion of present requirements" and that the petitions did not present "the usual case of possible fluctuating conditions, but of a changed economic level."

The decision in the *Santa Fe* case was further explained and applied in *United States* v. *Northern Pacific R. R. Co.*, 288 U. S. 490, in which the Circuit Court of Appeals (on a showing that the record therein before the Interstate Commerce Commission had been closed on January 15, 1930, and a petition for rehearing had been filed with the Commission on February 3, 1932) had held that the decision of this Court in the *Santa Fe* case required a rehearing and that, because of the Commission's denial of the petition for rehearing the order could not be sustained. In reversing this judgment, this Court said (at p. 494):

> The decision in the *Santa Fe* case is not to be extended to require a rehearing in every rate case for changed economic conditions,

> however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public.

Under the holding in the *Northern Pacific* case it is clear that the Secretary was justified in the present case in denying the petition for re-opening and further hearing.*

Appellant made no effort to present to the District Court evidence supporting the allegations of the petition for re-opening and further hearing, as it did in the suit attacking the first rate order of the Secretary. *St. Joseph Stockyards Co.* v. *United States,* 58 F. (2d) 290. The record in this case, therefore, does not contain a shred of evidence in support of such allegations.

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* Similar petitions for rehearing have been made in other rate proceedings recently held under the Packers and Stockyards Act, and have been denied by the Secretary. In four of these proceedings the rate orders have been challenged in District Courts on the ground *inter alia* that it was error to deny the petitions for rehearing. In each case, however, the order of the Secretary has been sustained by the District Court, and the denial of the petition for rehearing has in each case been expressly upheld. *Union Stockyards Company of Omaha* v. *United States*, 9 F. Supp. 864, 871, 873; *Morgan* v. *United States*, 8 F. Supp. 766; *American Commission Co.* v. *United States*, 11 F. Supp. 965, 972; and *Acker* v. *United States*, 12 F. Supp. 776.

E. THE POSITION OF THE DISTRICT COURT WITH RESPECT TO THE SCOPE OF JUDICIAL REVIEW IS NOT REVERSIBLE ERROR

(Appellant's Brief, Point I, p. 10)

The District Court stated at several places in the opinion that the findings of fact made by the Secretary are conclusive if supported by substantial evidence (R. 913–917). Appellant contends that this was error (Br., pp. 10–22).

It should be observed that Section 316 of the Packers and Stockyards Act adopts the same procedure for enjoining the enforcement of orders of the Secretary of Agriculture that had been provided by previous laws for enjoining the enforcement of orders of the Interstate Commerce Commission (42 Stat. 168; U. S. C. Title 7, Sec. 217). The findings of the Commission, of course, are subject to review, "but when supported by evidence are accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547–548. See also *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. This Court has held that the decisions involving review of orders of the Interstate Commerce Commission are also applicable to the review under Section 316 of the Packers and Stockyards Act of rate orders of the Secretary of

Agriculture. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 442.

Rate making, of course, is a legislative process. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226. This Court has said that "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice* v. *New York,* 264 U. S. 292, 294.

Factual determinations made by a legislature as a basis for the enactment of a regulatory statute, even in a suit attacking the constitutionality of the statute, are accorded a presumption of correctness. The same presumption of correctness should be accorded findings of fact of a rate-making body, even in a suit attacking the constitutionality of an order based thereon. Even though the courts have a duty to review the evidence more critically when confiscation is an issue and to reach their independent conclusions of constitutional fact, it would not be feasible to require them to substitute their independent judgment as to the weight of the evidence for that of the body exercising delegated legislative power upon every factual question as to which conflicting evidence is presented. *It*

*is submitted that constitutional rights are adequately protected if the reviewing court examines the evidence for itself and determines that it does not compel arrival at different conclusions of fact than those reached by the rate-making authority.* The proper scope of review is that stated by this Court in *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, when in upholding a rate order it was said (at pp. 315–316), "our inquiry must be * * * whether the evidence *requires the conclusion* that by reason of the inadequacy of the valuation the result is confiscation." [Italics supplied.]

It is quite apparent that the District Court made a minute and careful analysis of the evidence. The opinion discusses in considerable detail the evidence on the various questions presented, and makes many specific findings. The court also, in addition to specific findings contained in the opinion, adopted the findings of the Secretary as its own, thereby indicating that its review of the evidence led it to substantial agreement with the Secretary's findings of fact. It is submitted that appellant had an adequate judicial review in the District Court.

But even if the District Court in its discussion of the scope of judicial review adopted an erroneous position, it would not follow that the decree should be reversed. The issue in this case is not

the reasoning adopted by the lower court in reaching the conclusion that the maximum rates prescribed by the Secretary are not confiscatory *but whether those rates are in fact confiscatory.* This is an equity case and it comes before this Court on appeal. All of the material portions of the record before the Secretary and the District Court are now before this Court. Appellees are willing to submit the order herein challenged to the test of any degree of judicial review which this Court deems to be required by the Constitution. If this Court finds that the maximum rates prescribed by the Secretary are not in fact confiscatory, the decree of the lower court is correct and should be affirmed irrespective of possible error in its reasoning. *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 680.

The Government contends that in so far as the ultimate decision of this case is concerned, it is immaterial what scope is given to judicial review because it is believed that a clear preponderance of the evidence shows that the maximum rates prescribed are fair, reasonable, and non-confiscatory.

It is clear, however, that the judgment of the Secretary on the evidence should be given great weight and should not be treated as nugatory. The Secretary is "a tribunal appointed by law and informed by experience" * to determine reasonable

* *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454.

and non-discriminatory stockyard rates, and it is patent from an examination of the order challenged herein that a vast amount of careful study in the light of technical knowledge surrounding the operation of stockyards has gone into the preparation of this order.**

The burden of proof rests heavily upon appellant to prove by convincing evidence that the order is confiscatory. In *Los Angeles Gas & Electric Corp.* v. *R. R. Commission*, 289 U. S. 287, this Court said (at pp. 304–305):

> We approach the decision of the particular questions thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the Court. We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446. The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but

** The District Court found that "This order shows careful consideration by the Secretary" (R., 917).

> the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established.

See also *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 169; *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio*, 292 U. S. 290, 298.

Manifestly it is not enough for appellant to establish that the Secretary may have erred with respect to some of the minor factual items or that the District Court may have erred in some of its reasoning. The position which appellant must sustain in order to succeed in this appeal is to prove beyond reasonable doubt that the total result of the Secretary's determination as to maximum just and reasonable rates is necessarily confiscatory. Even if error may have been committed in some particulars, the order should be sustained if such error is offset by liberality in other particulars. *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 266–268. It is respectfully submitted that the record in this case demonstrates beyond doubt that appellant has completely failed to sustain its burden of proof.

## CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

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FEBRUARY 1936.

## APPENDIX

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, 163–168 (U. S. C., Title 7, Secs. 201 *et seq.*) provides in part as follows:

> SEC. 301. When used in this Act—
>
> (a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;
>
> (b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;
>
> (c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and
>
> (d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.
>
> SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard * * *.
>
> SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and non-

discriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reas-

onable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

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